

# It's a "Criming Shame": Moving from Land Use Ethics to Criminalization of Behavior Leading to Permits and Other Zoning Related Acts

Patricia Salkin\*  
Bailey Ince\*\*

## I. Introduction

ANNUAL REVIEWS OF CASES INVOLVING ALLEGATIONS OF ETHICAL VIOLATIONS in land use typically reveal situations where members of planning or zoning boards or local legislative bodies have a real or perceived conflict of interest in their role as decisionmakers.<sup>1</sup> These conflicts of interest arise due to personal relationships with an applicant or neighbor, employment situations, or investments that could lead to decisions made in self-interest. Typically, these ethical dilemmas are resolved under state and local ethics laws, often laws aimed at directing the public officials involved to disclose or recuse themselves from the decision-making process.<sup>2</sup>

Violations for failing to adhere to these ethics laws may include civil sanctions, removal from office and the imposition of misdemeanor penalties. Except for the rare misdemeanor prosecution, state and local governments typically treat ethics violations as civil matters, and from a review of the reported case law over the years, a large number of the situations involving allegations of unethical conduct are dismissed by the courts because the statute or local law did not specifically cover

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\*Patricia Salkin is Dean and Professor of Law at Touro Law Center. She is the author of the five-volume *American Law of Zoning* and the four-volume *New York Zoning Law and Practice*. Salkin frequently writes and lectures on the subject of ethics and land use.

\*\*Bailey Ince is a 2013 graduate of Touro Law Center where he served as New York Constitutional Law Editor on the *TOURO LAW REVIEW*.

1. See, e.g., Patricia E. Salkin, *2009 Ethical Considerations in Land Use*, 41 *URB. LAW.* 529 (2009); Patricia E. Salkin, *Crime Doesn't Pay and Neither Do Conflicts of Interest in Land Use Decisionmaking*, 40 *URB. LAW.* 561 (2008).

2. See, e.g., MONT. CODE ANN. § 2-2-121(5) (2013); N.J. STAT. ANN. § 40:55D-69 (West 2013).

the underlying action.<sup>3</sup> In recent years, however, annual reviews of cases involving allegations of ethical violations in land use have revealed a growing number of reported criminal cases. These cases largely involve criminal law issues, yet the underlying gravamen of the initial actions stem from conduct involving the land use permitting process.<sup>4</sup>

In the last two decades, federal prosecutors have convicted more than 20,000 defendants involved in public corruption.<sup>5</sup> That staggering figure includes the convictions of federal, state, and local officials, as well as private citizens involved in the corruption.<sup>6</sup> Perhaps more incredible is that even after putting thousands of corrupt officials behind bars, instances of public corruption are not abating. Recently, a United States Attorney for the Southern District of New York commented on this situation, characterizing it as “a culture of corruption [that] has developed and grown, just like barnacles on a boat bottom.”<sup>7</sup> In fact, Manhattan prosecutors who have already gained reputations for “collaring crooked government officials” have pledged to redouble their efforts and fight corruption more aggressively in the future.<sup>8</sup> Additionally, one of the Federal Bureau of Investigation’s top agency-wide priorities remains combating public corruption, behind eliminating terrorist threats, protecting the U.S. against foreign intelligence and espionage threats, and cyber-warfare attacks.<sup>9</sup> According to Robert Mueller III, the Director of the FBI, the Bureau has doubled the number of agents in the public corruption sector, and consequently the number of investigations has spiked as well.<sup>10</sup>

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3. *E.g.*, Nev. Comm’n on Ethics v. Carrigan, 131 S. Ct. 2343 (2011).

4. *See, e.g.*, Blackmon v. Richmond Cnty., 162 S.E.2d 436 (Ga. 1968); Gooding Cnty. v. Wybenga, 46 P.3d 18 (Idaho 2002).

5. PUB. INTEGRITY SECTION, U.S. DEP’T OF JUSTICE, REPORT TO CONGRESS ON THE ACTIVITIES AND OPERATIONS OF THE PUBLIC INTEGRITY SECTION FOR 2011 28 (2011), <http://www.justice.gov/criminal/pin/docs/2011-Annual-Report.pdf> (tracking the number of convictions of corrupt public officials from 1992 through 2011).

6. *Id.*

7. James M. Odato, *Just like barnacles on a boat*, TIMES UNION, Apr. 23, 2013, <http://www.timesunion.com/local/article/Just-like-barnacles-on-a-boat-4453477.php>; *see also* Elkan Abramowitz & Barry A. Bohrer, *Overcriminalization and the Fallout from ‘Skilling’*, 245 N.Y. L.J. 2, Jan. 4, 2011 (discussing legislative and prosecutorial efforts to prosecute corrupt public officials), [http://www.maglaw.com/publications/articles/00239/\\_res/id=Attachments/index=0/070011116Morvillo.pdf](http://www.maglaw.com/publications/articles/00239/_res/id=Attachments/index=0/070011116Morvillo.pdf).

8. Odato, *supra* note 7.

9. FED. BUREAU OF INVESTIGATION, DEP’T OF JUSTICE, TODAY’S FBI: FACTS & FIGURES 2013-2014 7 (2014), *available at* <http://www.fbi.gov/stats-services/publications/todays-fbi-facts-figures/facts-and-figures-031413.pdf/view> [hereinafter TODAY’S FBI: FACTS & FIGURES 2013-2014].

10. Robert S. Mueller III, Dir., Fed. Bureau of Investigation, Remarks at the American Bar Association Litigation Section Annual Conference (Apr. 17, 2008) (transcript

One of the primary reasons for law enforcement's increase in attention to public corruption is its substantial impact: it "strikes at the heart of government, eroding public confidence and undermining the strength of our democracy."<sup>11</sup> When the integrity of the governing officials—who are supposed to place public service above self-interest—is sacrificed for personal benefit, the public's confidence in government is sacrificed as well. At the root, self-interest and self-dealing are essentially ethics violations with the officials violating their fiduciary duties to their constituents. The solution, so far, has been to impose higher standards of ethics on government officials and sometimes, depending on how severe the unethical conduct is, impose criminal penalties as well. The recent attention given to the issue and the increasingly visible role that federal law enforcement officials are taking is indicative of a growing plague of corruption sweeping the nation.<sup>12</sup>

One of the areas in which reported instances of public corruption has seen a dramatic increase in federal prosecutions is at the local level of government dealing with land use. In the past, land use ethics inquiries predominately involved conflicts of interest or an official holding public office while engaging in a previously held business or law practice. Now, prosecutors are looking at the underlying criminality of the unethical acts carried out in the context of land use decisions.<sup>13</sup> With a wide array of criminal statutes in the hands of federal prosecutors, almost all forms of unethical conduct could in some way also violate a federal criminal statute.<sup>14</sup>

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available at <http://www.fbi.gov/news/speeches/corporate-fraud-and-public-corruption-are-we-becoming-more-crooked>).

11. TODAY'S FBI: FACTS & FIGURES 2013-2014, *supra* note 9, at 38.

12. See Ed Pilkington, *New Jersey scandal highlights cycle of ongoing corruption: Pundits in the state express frustration at inability to rout out pervasive corruption at a local level*, THE GUARDIAN (July 24, 2009), <http://www.guardian.co.uk/world/2009/jul/24/new-jersey-corruption-mayors-rabbis> (describing why, in 2009, law enforcement officials arrested forty-four public officials for corruption); Thomas J. Gradel & Dick Simpson, *Patronage, Cronyism and Criminality in Chicago Government Agencies*, Feb. 2011, [http://www.uic.edu/depts/pols/ChicagoPolitics/AntiCorruptionReport\\_4.pdf](http://www.uic.edu/depts/pols/ChicagoPolitics/AntiCorruptionReport_4.pdf) (detailing roughly 400 public corruption arrests in Chicago in the last two decades).

13. Again, FBI field offices continue to fight public corruption at all levels of government and in all capacities, specifically referencing the crimes that could stem from all fields related to land-use. See, e.g., *Birmingham Division*, FBI.Gov, <http://www.fbi.gov/birmingham/about-us/priorities/priorities> (last visited Mar. 18, 2014) (describing the duties of the Birmingham Division of the Federal Bureau of Investigation).

14. Title 18 U.S.C. § 201, the federal bribery statute, has been interpreted narrowly, unlike its stepchildren: the honest services fraud statute, 18 U.S.C. § 1346, which expands upon § 201 to cover more public officials; the Hobbs Act, 18 U.S.C. § 1951,

Part II of this article reviews the federal statutes most often used by federal prosecutors and provides some examples of recent reported cases in which the underlying illegal or unethical conduct involved alleged criminal activity. Part III offers some examples of recent reported state court cases in which criminal acts involving land use permitting or decision-making were the underlying cause of the subsequent or reported court action. Part IV concludes with the caveat that municipal attorneys and public officials can no longer simply view ethical issues in land use as a local or state civil matter, and those who work in and advise those in the public sector should be mindful of the tools at the disposal of federal investigators and prosecutors.

## II. Federal Criminal Conduct in the Land Use Context

### A. 18 U.S.C. § 201—*Bribing a Public Official*

Public officials guilty of federal corruption charges are most frequently convicted of accepting a bribe.<sup>15</sup> Bribing a government official—or accepting a bribe as an official—is inherently unethical because the official renders a decision tainted by self-interest to obtain a personal benefit, and the resulting outcome may not be in the public's best interest. While every state has penal laws that prohibit this type of conduct and prescribe appropriate criminal penalties, often the local jurisdiction is unenthusiastic about addressing situations involving political players who may be viewed as peers or friends. Furthermore, local prosecutorial offices are often understaffed and challenged to prioritize street crimes and to deal with public safety issues rather than pursuing corrupt officials. Increasingly, the federal government has been stepping in to fill this prosecutorial void.

Title 18 U.S.C. § 201 prohibits both bribery and the acceptance of certain gratuities by a public official to influence an official act.<sup>16</sup> The United States Supreme Court in *United States v. Sun-Diamond Grow-*

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which criminalizes extortion under the color of official right; and 18 U.S.C. § 666, which has become almost a general anti-corruption statute with an expansive scope. Additionally, while § 201 requires proof of a quid pro quo, or the receiving of a benefit in exchange for something (which is a government act in the public corruption context), § 1346 does not. There is a federal circuit court split on whether § 666 requires proof of a quid pro quo.

15. *Corruption Update: A Busy Month Comes to a Close*, FBI.GOV, [http://www.fbi.gov/news/stories/2011/june/corruption\\_063011/corruption\\_063011](http://www.fbi.gov/news/stories/2011/june/corruption_063011/corruption_063011) (last visited Mar. 18, 2014).

16. 18 U.S.C. § 201(b)(c) (2012); *see also* *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404-05 (1999) (explaining the statute's prohibitions).

*ers of California*<sup>17</sup> provided the clearest description of the two crimes, stating:

The first crime, described in § 201(b)(1) as to the giver, and § 201(b)(2) as to the recipient, is bribery, which requires a showing that something of value was corruptly given, offered, or promised to a public official (as to the giver) or corruptly demanded, sought, received, accepted, or agreed to be received or accepted by a public official (as to the recipient) with intent, *inter alia*, 'to influence any official act' (giver) or in return for 'being influenced in the performance of any official act' (recipient). The second crime, defined in § 201(c)(1)(A) as to the giver, and in § 201(c)(1)(B) as to the recipient, is illegal gratuity, which requires a showing that something of value was given, offered, or promised to a public official (as to the giver), or demanded, sought, received, accepted, or agreed to be received or accepted by a public official (as to the recipient), 'for or because of any official act performed or to be performed by such public official.'<sup>18</sup>

In other words, a public official is guilty of accepting a bribe under § 201(b) when he receives something of value from a third party that is intended to influence the performance of his duties as a public official.<sup>19</sup> The agreement must include a quid pro quo, that is, something of value in exchange for an official act.<sup>20</sup>

The timing of the illegal gratuity under § 201(c) is irrelevant—it could have been given and received before an official act is commenced or after the act is completed.<sup>21</sup> Furthermore, the "thing of value" could also constitute an illegal gratuity if it is given to an official for an act that the official has already decided to execute, similar to an appreciative gesture.<sup>22</sup> One of the last elements to establish a violation of this statute is that the government must prove that the bribe or illegal gratuity is directly linked to a specific official act.<sup>23</sup>

The distinguishing element of each of these crimes is the intent: to be convicted of bribery, one must intend to influence an official act or to be influenced in performing an official act, while accepting or giving an illegal gratuity only requires that the gratuity be given or accepted "for or because of" an official act.<sup>24</sup> Under § 201(b), bribery, either the recipient or giver must intend to receive or give something in exchange for a specific, desired official action (quid pro quo), whereas under § 201(c) an illegal gratuity "may constitute merely a reward for

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17. 526 U.S. 398 (1999).

18. *Id.* at 404.

19. *Id.*

20. *Id.* at 404-05.

21. *Id.*

22. *Id.* at 404.

23. *Id.* at 414.

24. *Id.* at 404-05.

some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken.”<sup>25</sup>

Another distinguishing factor of the two crimes is the punishment upon conviction. Someone guilty of bribery could be sentenced to up to 15 years of imprisonment, a fine of \$250,000 (or triple the value of the bribe, whichever is greater), and disqualification from holding office.<sup>26</sup> On the other hand, violating the illegal gratuity statute could lead to a sentence of up to 2 years of prison and a fine of \$250,000.<sup>27</sup>

#### 1. CASH BRIBES FOR LAND USE ACTIONS

In the land use arena, bribes have reportedly been given to officials to vote a certain way for variances, zoning approval, granting development rights, and other land use decisions.<sup>28</sup> For example, in *United States v. Curescu*,<sup>29</sup> defendant Curescu converted residential buildings to apartments.<sup>30</sup> Curescu paid about \$10,000 to an FBI informant and professional expeditor, Catherine Romasanta, to alter the computer mainframe records to show that Curescu’s building originally contained more units and to pay off a city inspector to overlook the code violations.<sup>31</sup> Curescu had used Romasanta on previous projects, for which he paid her about \$4,000 for each additional unit he sought.<sup>32</sup> Between 2004 and 2007, Romasanta passed about \$187,000 to more than 25 Chicago officials for favorable treatment, including expedited building inspections, grants of variances, and inspectors’ approvals of code violations.<sup>33</sup> Curescu was arrested and subsequently convicted of conspiracy to bribe a public official (the zoning inspector), bribery of a zoning inspector, and bribery under 18 U.S.C. § 666.<sup>34</sup>

Romasanta assisted the FBI again in *United States v. Reese*,<sup>35</sup> helping convict supervising building inspector Reese who perpetrated a bribery scheme with two other Chicago officials. Reese apparently conspired with a building inspector and building contractor to accept money from other individuals to issue certificates of occupancy, expe-

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25. *Id.* at 405.

26. *See* 18 U.S.C. §§ 201(b), 3571.

27. *See* 18 U.S.C. §§ 201(c), 3571.

28. *See, e.g., United States v. Boone*, 628 F.3d 927 (7th Cir. 2010).

29. *United States v. Curescu*, No. 08 CR 398, 2011 WL 2600572 (N.D. Ill. June 29, 2011).

30. *Id.* at \*1.

31. *Id.* at \*2.

32. *Id.*

33. *Id.*

34. *Id.* at \*11. *See infra* Part II.C. for discussion of 18 U.S.C. § 666 (2012).

35. 666 F.3d 1007 (7th Cir. 2012).

dite permit approvals, and grant variances. It was alleged that in about a year and a half, Reese was personally accountable for \$117,000 in bribes.<sup>36</sup> He was sentenced to sixty months imprisonment.<sup>37</sup>

## 2. SERVICES IN EXCHANGE FOR REZONING

Any good or service that is given or performed in order to elicit some benefit in the form of an official act may constitute bribery. Sometimes, the benefit received does not take the form of tangible items like cash or a gift, but instead takes the form of services. In *United States v. Boender*,<sup>38</sup> the defendant purchased property in an industrial district and sought to have it rezoned for commercial and residential uses.<sup>39</sup> In order to facilitate the rezoning, Boender cultivated the support of the local alderman by making improvements to the alderman's house.<sup>40</sup> The improvements included painting, installing new windows, replacing several doors, and performing other interior work.<sup>41</sup> In total, the equivalent value of the contracting services was around \$38,000.<sup>42</sup> These services formed the basis for the charge of corruptly giving things "of value" to a public official.<sup>43</sup> In short, any good that is given or services that are performed in order to elicit some benefit in the form of an official act will constitute bribery.

## 3. CAMPAIGN CONTRIBUTIONS IN EXCHANGE FOR PERMITS

Generally, campaign contributions are not considered to be bribes, even though contributing to a campaign may lead a donor to expect some sort of benefit in return.<sup>44</sup> A campaign contribution, however, can have the same effect as a bribe in that the donor may receive benefits from the elected official as a result of the campaign contribution. They can even be used as a tool to circumvent the bribery statute: the donor can donate to a campaign fund instead of passing money directly to the official. Congress has passed extensive laws governing

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36. *Id.* at 1011.

37. *Id.*

38. 649 F.3d 650 (7th Cir. 2011).

39. *Id.* at 651

40. *Id.* at 651-52.

41. *Id.* at 652.

42. *Id.*

43. *Id.* at 653.

44. See *U.S. v. Biaggi*, 909 F.2d 662, 695 (2d Cir.1990); *Cf. McCormick v. U.S.*, 500 U.S. 257, 271 (1991); *U.S. v. Allen*, 10 F.3d 405, 410 (7th Cir. 1993) (suggesting that more than a mere campaign contribution is needed to be convicted under the Hobbs Act).

campaign finance and contributions so that a “loophole” in one law is closed by another law.<sup>45</sup>

For instance, many states and the federal government impose limits on the amount of money a person can contribute to a political candidate’s campaign.<sup>46</sup> To get around this limitation, a candidate may ask a campaign contributor to write a number of checks just below the maximum dollar amount permitted by that jurisdiction for contributions using false names of contributors or the names of others as a ruse.<sup>47</sup> Such was the tactic of the defendant in *Boender*. The defendant, in his efforts to procure favorable outcomes for rezoning applications, contributed to the alderman’s aunt’s congressional campaign under his own name and false names, and also reimbursed his workers for their contributions.<sup>48</sup> This loophole was closed by laws prohibiting a person from making donations in the name of another person.<sup>49</sup> Congress passed 2 U.S.C. § 441(f), proscribing contributions made “in the name of another person or knowingly permitting his name to be used to effect such a contribution.”<sup>50</sup> By extension, § 441(f) also prohibits a person from knowingly “accept[ing] a contribution made by one person in the name of another person.”<sup>51</sup> In the *Boender* case, the court held that this statute unambiguously proscribes “straw man”—as well as false name—contributions and found that Boender had violated § 441(f).<sup>52</sup>

Again, intent is important. As touched upon before, campaign contributions are somewhat odd in that, on their face, they operate much like a bribe, although they do not usually constitute a bribe due to lack of intent. For example, the basic premise of a campaign contribution is that the constituent donates money with the expectation of receiving some benefit in return, but what is lacking is an agreement that the

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45. See David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws*, 18 REV. LITIG. 85 (1999).

46. FED. ELECTION COMM’N., CONTRIBUTION LIMITS 2013-14, <http://www.fec.gov/pages/brochures/contriblimits.shtml>; NAT’L CONFERENCE OF STATE LEGISLATURES, STATE LIMITATIONS ON CONTRIBUTIONS TO CANDIDATES- 2011-2012 ELECTION CYCLE, [http://www.ncsl.org/Portals/1/documents/legismgt/Limits\\_to\\_Candidates\\_2011-2012.pdf](http://www.ncsl.org/Portals/1/documents/legismgt/Limits_to_Candidates_2011-2012.pdf) (last updated Sept. 2011).

47. See *United States v. Beldini*, 443 F. App’x 709, 710 (3d Cir. 2011) (“[The defendant] broke the money up into smaller increments to conceal the identity of the real contributor.”).

48. *Boender*, 649 F.3d at 653.

49. 2 U.S.C. § 441f (2012) (“No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.”).

50. *Id.*

51. *Id.*

52. *Boender*, 649 F.3d at 660.



payment will influence an official act.<sup>53</sup> A bribe doubling as a campaign contribution will not insulate it from scrutiny.<sup>54</sup> A campaign contribution may be more likely to fly under the radar of law enforcement if it has a legitimate alternative explanation, such as representing a citizen's general support for the candidate and his views, than if there is no legitimate alternative explanation.<sup>55</sup> To rebut this alternative and support a finding of a quid pro quo, the prosecution would have to look at the circumstances surrounding the contribution to ensure it was a legitimate contribution rather than a bribe.<sup>56</sup>

*B. Extortion Under Color of Official  
Right—Hobbs Act, 18 U.S.C. § 1951*

The Hobbs Act,<sup>57</sup> enacted in 1946, provides that a public official is guilty of extortion “under color of official right” when he induces someone to relinquish their property in exchange for some act that the official is already under a duty to perform.<sup>58</sup> In short, an official who chooses to use or refrain from using his authority in order to induce payment from someone has violated the Hobbs Act. This Act therefore embraces bribery under title 18 U.S.C. § 201, but unlike that statute,<sup>59</sup> the Hobbs Act is applicable to government officials at all levels, not just federal, and no quid pro quo is required.<sup>60</sup> To be convicted under the Hobbs Act, it is sufficient for a politician merely to accept property to which he is not entitled knowing it was given in exchange for official acts.<sup>61</sup> The Hobbs Act, however, is narrower than

53. See *United States v. Terry*, 707 F.3d 607 (6th Cir. 2013) (“So long as a public official agrees that payments will influence an official act, that suffices.”).

54. *Id.* at 613.

55. See *United States v. McGregor*, 879 F. Supp. 2d 1308, 1314 (M.D. Ala. 2012) (“[T]he government must prove beyond a reasonable doubt that a campaign contribution was ‘made in return for an explicit promise or undertaking by the official to perform or not to perform an official act.’”).

56. See *id.* (“Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, ‘under color of official right.’” (quoting *McCormick v. United States*, 500 U.S. 257, 272 (1991))).

57. 18 U.S.C. § 1951 (2012).

58. *Id.*; see also *Evans v. United States*, 504 U.S. 255, 273 (1992) (Kennedy, J., concurring) (determining that “the word ‘induced’ in the statutory definition of extortion applies to the phrase ‘under color of official right.’”).

59. 18 U.S.C. § 201 (2012).

60. 18 U.S.C. § 1951 (2012).

61. See, e.g., *United States v. Manzo*, 636 F.3d 56, 60 (3d Cir. 2011) (“For the government to prove a violation of the Hobbs Act . . . it ‘need only show that a public

§ 201 in that only the government official would be guilty of extortion under the Hobbs Act. Under § 201, both the donor and the official would be guilty of a federal felony.<sup>62</sup>

One of the most recent high-profile arrests of a government official for extortion under color of official right was that of Martha Shoffner, the Arkansas State Treasurer, who was accused of passing large sums of the state's bond holdings to a single individual in exchange for over \$30,000.<sup>63</sup> According to federal prosecutors, Shoffner extorted thousands of dollars from a securities broker who sought a larger share of the state's bond business. She resigned before being formally removed from office and faced up to twenty years in prison, a fine of \$250,000, or both.<sup>64</sup> Her trial is scheduled to begin March 3, 2014.<sup>65</sup>

One Hobbs Act case that specifically relates to land use is *Van Pelt v. United States*.<sup>66</sup> In *Van Pelt*, the defendant was a New Jersey Assemblyman and a Waretown Township Committeeman who promised to help an undercover FBI cooperator (Solomon Dwek) acquire permits and Department of Environmental Protection approval for a fictitious development.<sup>67</sup> In return, Dwek passed \$10,000 to Van Pelt and also promised to meet with other committee members and bribe them if necessary to expedite the process and render a favorable decision for Dwek.<sup>68</sup> Van Pelt's willingness to accept Dwek's payment in return for his assistance in obtaining the necessary government approvals violated the Hobbs Act

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official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts'"); *United States v. Donna*, 366 Fed. App'x 441, 449 (3d Cir. 2010) ("[T]he official does not have to promise to perform a specific action in exchange for a specific gift; instead, the official can accept a 'stream of benefits' in exchange for one or more official acts as though the official is on a retainer."); *United States v. Ganim*, 510 F.3d 134, 144 (2d Cir. 2007) ("[T]o obtain conviction for Hobbs Act extortion, it was sufficient for government to prove that former mayor understood that he was expected, as a result of payment, to exercise particular kinds of influence, on behalf of the donor, as specific opportunities arose").

62. See *United States v. Brock*, 501 F.3d 762, 764 (6th Cir. 2007) (the donor of a bribe to a government official cannot "conspire with that official to extort property from himself in violation of the Hobbs Act").

63. Ana Campoy, *Arkansas Official Accused of Extortion*, WALL ST. J., May 20, 2013, <http://online.wsj.com/article/SB10001424127887323463704578495452219840198.html>.

64. *Id.*

65. Chuck Bartels, *Government describes evidence for Shoffner trial*, THE WASHINGTON TIMES, Feb. 17, 2014, <http://www.washingtontimes.com/news/2014/feb/17/government-describes-evidence-for-shoffner-trial/>.

66. *Van Pelt v. United States*, Civ. No. 11-6810 JAP, 2013 WL 592285 (D.N.J. Feb. 14, 2013).

67. *Id.* at \*1.

68. *Id.*

because, as a committeeman, Van Pelt was required to evaluate permit applications.<sup>69</sup> Van Pelt was sentenced to forty-one months in prison.<sup>70</sup>

### C. 18 U.S.C. § 666—Bribery Concerning Programs

#### *Receiving Federal Funds*

Another tool in the arsenal of federal prosecutors is 18 U.S.C. § 666, which criminalizes theft or bribery in programs receiving federal funds.<sup>71</sup> This statute was created in the wake of the Supreme Court's decision in *Dixon v. United States*,<sup>72</sup> which limited § 201 to federal officials. As a result, Congress passed § 666 to establish criminal liability for agents of *any* organization, government, or agency who "corruptly solicit[] or demand[] . . . anything of value" worth more than \$5,000<sup>73</sup> when the official's employing organization receives more than \$10,000 in federal funds during a twelve-month period.<sup>74</sup>

This statute has provided federal prosecutors with a powerful tool for combating corruption in a wide array of circumstances including state and local governments, thus shifting from a statute with an original purpose to protect federal funds to a general anti-corruption statute.<sup>75</sup> The scope of § 666 is incredibly broad; all states and most municipalities receive some form of federal funding above \$10,000 annually.<sup>76</sup>

The far-reaching applicability has implicated officials on grounds that are tenuous at best. For example, former Illinois Governor Rod Blagojevich was convicted under § 666 for threatening to block state funding for a hospital unless its CEO contributed \$50,000 to his campaign, which has nothing to do with mishandling federal funds, but not for the more infamous charge of attempting to sell a then-vacant Senate seat.<sup>77</sup> *Boender* is also evidence of § 666's expansive public corruption scope. In *Boender*, bribing the alderman with contracting ser-

69. *Id.*

70. *Id.*

71. 18 U.S.C. § 666 (2012).

72. *Dixon v. United States*, 465 U.S. 482, 496 (1984).

73. 18 U.S.C. § 666(a)(1)(B) (2012).

74. 18 U.S.C. § 666(b) (2012).

75. See *United States v. Frega*, 933 F. Supp. 1536, 1543 (S.D. Cal. 1996); see also *United States v. Cicco*, 938 F.2d 441, 446 (3d Cir. 1991) ("Congress intended § 666 to address different and more serious criminal activity.").

76. Part of the reason for these attenuated links is that federal funds need not be affected in any way for a § 666 violation to have occurred. See *Salinas v. United States*, 522 U.S. 52, 56-57 (1997) ("The enactment's expansive, unqualified language, both as to the bribes forbidden and the entities covered, does not support the interpretation that federal funds must be affected to violate § 666(a)(1)(B).").

77. See *Rod Blagojevich Public Corruption Case*, FBI.GOV (Mar. 12, 2012), <http://www.fbi.gov/news/podcasts/inside/rod-bлагоjevich-public-corruption-case.mp3/view>; Brian Greene, *Rod Blagojevich Begins 14-year Prison Sentence*, US NEWS, Mar. 15,

vices served as the basis of the § 666 count,<sup>78</sup> yet neither Boender nor the alderman exchanged money or affected federal distribution of funds in any way. Even with this tenuous link, the defendant's conviction was upheld.<sup>79</sup> Under § 666, it matters only that the government, organization, or agency *receives* federal funds, and not that these funds were implicated in influencing a public official.<sup>80</sup>

Another key distinction between § 666 and § 201 is that § 201 requires a quid pro quo; the federal circuit courts of appeals are split on whether § 666 requires a quid pro quo. The Second,<sup>81</sup> Fourth<sup>82</sup> and Eighth<sup>83</sup> Circuit Courts of Appeals require proof of a quid pro quo while the Sixth,<sup>84</sup> Seventh,<sup>85</sup> and Eleventh<sup>86</sup> Circuits do not. Therefore, in some jurisdictions conviction under § 666 can result merely from proof of money being given to a public official with an attempt to reward or influence him.<sup>87</sup>

#### 1. SOLICITING BRIBES TO EXPEDITE PERMIT PROCESS

*United States v. Beldini*<sup>88</sup> exemplifies § 666 in a land use context. In *Beldini*, Solomon Dwek, an FBI coordinator, posed as a real estate de-

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2012, <http://www.usnews.com/news/articles/2012/03/15/rod-bлагоjeovich-begins-14-year-prison-sentence>.

78. *Boender*, 649 F.3d at 653.

79. *Id.* at 661.

80. *See Salinas*, 522 U.S. at 57 ("The prohibition [of accepting a bribe] is not confined to a business or transaction which affects federal funds. The word 'any,' which prefaces the business or transaction clause, undercuts the attempt to impose this narrowing construction.").

81. *Ganim*, 510 F.3d at 151 (holding there was no plain error in a jury instruction that stated that the government must prove a corrupt intent, which "means the intent to engage in some specific quid pro quo").

82. *United States v. Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998) (holding that the "corrupt intent" requirement in § 666 requires the government to prove a quid pro quo).

83. *United States v. Redzic*, 627 F.3d 683 (8th Cir. 2010).

84. *United States v. Abbey*, 560 F.3d 513, 520 (6th Cir. 2009) ("While a 'quid pro quo of money for a specific . . . act is sufficient to violate [18 U.S.C. § 666(a)(1)(B)],' it is 'not necessary'" (quoting *United States v. Gee*, 432 F.3d 713, 714 (7th Cir. 2005))).

85. *Gee*, 432 F.3d at 714 ("A quid pro quo of money for a specific legislative act is sufficient to violate the statute, but it is not necessary.").

86. *United States v. McNair*, 605 F.3d 1152, 1188 (11th Cir. 2010) ("There is no requirement in § 666(a)(1)(B) or (a)(2) that the government allege or prove an intent that a specific payment was solicited, received, or given in exchange for a specific official act, termed a quid pro quo."); *see also* *United States v. Siegelman*, 640 F.3d 1159, 1170 (11th Cir. 2011) (noting that "the Supreme Court has not yet considered whether the federal funds bribery, conspiracy or honest services mail fraud statutes require a similar 'explicit promise' [by the official to perform or not perform an official act]").

87. *McNair*, 605 F.3d at 1188.

88. *United States v. Beldini*, 443 F. App'x 709 (2011).

veloper in order to unearth corruption at City Hall.<sup>89</sup> In 2009, Leona Beldini was the Deputy Mayor of Jersey City reporting directly to the Mayor, Jerramiah Healy.<sup>90</sup> Solomon Dwek, the same FBI cooperator from *Van Pelt*, posed as a real estate developer in order to unearth corruption in City Hall.<sup>91</sup> When Dwek attempted to set up a meeting with the mayor, he was referred to Beldini.<sup>92</sup> In return for obtaining the necessary permits and approvals from various city agencies, Dwek promised to retain Beldini as the exclusive broker to sell the development's units and to donate thousands of dollars to Healy's campaign fundraising funds.<sup>93</sup> Beldini assured Dwek and the other officials that she could funnel the bribes through three different campaign accounts and that she would break up the money into smaller increments to conceal the true identity of the donor.<sup>94</sup> For these actions, Beldini was charged with federal program bribery in violation of § 666, and conspiracy to commit extortion under color of official right, in violation of the Hobbs Act.<sup>95</sup> Beldini was acquitted of the Hobbs Act charge, but was convicted of bribery under § 666 because the court determined that Beldini was an "agent" of a government, and that the campaign contributions were "things of value,"<sup>96</sup> thereby sustaining the federal program bribery conviction.<sup>97</sup> Furthermore, there was no legitimate alternative explanation Beldini could proffer to establish that the donations had a legal purpose.<sup>98</sup>

## 2. OVERZEALOUSLY REPRESENTING A CLIENT MAY LEAD TO CONSPIRACY FOR AN ATTORNEY

In *United States v. Ciresi*,<sup>99</sup> Robert Ciresi, a seventy-eight year old attorney, was charged with conspiring to purchase the votes of corrupt town councilmen regarding two zoning matters.<sup>100</sup> One of Ciresi's clients applied to the town council to rezone residential land so the client

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89. *Id.* at 710.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 711.

94. *Id.*

95. *Id.* at 712.

96. *Id.* at 719 ("The campaign contributions at issue are thousands of dollars. Beldini's proposition that this money is not a thing of value strains credulity.").

97. *Id.* at 721.

98. Beldini would also have a difficult time explaining why, if the donations were legitimate, she divided the \$10,000 into smaller increments, concealed the true identity of the donor, and funneled them through different campaign fund accounts.

99. *United States v. Ciresi*, 697 F.3d 19 (1st Cir. 2012).

100. *Id.* at 23.

could build a supermarket.<sup>101</sup> Ciresi set up the meeting at which his client agreed to pay \$25,000 in exchange for the votes of the city councilmen, and Ciresi made it clear that his client wanted his application to be approved with no conditions. For the first project, the council approved the application and the conspirators split \$25,000.<sup>102</sup> For the second project, Ciresi represented two developers seeking to convert an industrial mill complex into apartments.<sup>103</sup> Zambarano and Ciresi again sought to exact a bribe from them, but Ciresi eventually backed out.<sup>104</sup> However, Zambarano and the informant still managed to secure a bribe, and the rezoning application was subsequently approved.<sup>105</sup> Ciresi was later charged and convicted of bribing a local government official in violation of § 666 and conspiring to commit the same.<sup>106</sup> His attempts to procure favorable results for his clients' applications by purchasing votes were undoubtedly unethical, and also subjected him to criminal punishment.<sup>107</sup>

#### D. 18 U.S.C. § 1346—*Theft of Honest Services*

The predecessor to the modern-day mail and wire fraud laws originated in 1872 and proscribed the use of mail to perpetrate “any scheme or artifice to defraud.”<sup>108</sup> Congress amended the statute in 1909 to include “any scheme or artifice to defraud, obtaining money or property by means of false or fraudulent pretenses, representations, or promises.”<sup>109</sup> One after another, the U.S. Courts of Appeals interpreted the term “scheme or artifice to defraud” as including deprivations of intangible rights in addition to deprivations of money or property.<sup>110</sup> The “theft of honest services” doctrine was created in *Shushan v. United States*<sup>111</sup> when the Fifth Circuit equated a bribe of a public official to a scheme to defraud the public.<sup>112</sup> In essence, the logic is this: a bribe is a type of fraud, and fraud is a type of theft, and what the

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101. *Id.*

102. *Id.* at 23-24.

103. *Id.* at 24.

104. *Id.*

105. *Id.*

106. *Id.* at 25.

107. *Id.* at 32.

108. *Skilling v. United States*, 561 U.S. 358, 399 (2010) (quoting *McNally v. United States*, 483 U.S. 350, 356 (1987)).

109. *Id.*; see also 18 U.S.C. § 1341 (2012).

110. *Skilling*, 561 U.S. at 400-401.

111. *Shusan v. United States*, 117 F.2d 110 (5th Cir. 1941).

112. *Id.* at 115.

defendants are “stealing” is their constituents’ right to an honest official as part of an honest government.<sup>113</sup>

In 1988, Congress codified the judicial concept of “honest services” in 18 U.S.C. § 1346.<sup>114</sup> This was a windfall for prosecutors because “honest services” could mean almost anything, and prosecutors encompassed public and corporate fraud, as well as other forms of dishonesty, in its scope. However, major restrictions on § 1346 were imposed when the Supreme Court decided *Skilling v. United States*.<sup>115</sup> There, the Court limited § 1346’s application to only bribes and kickbacks<sup>116</sup> in order to save the overbroad statute from being invalidated for unconstitutional vagueness.<sup>117</sup>

More likely than not, a charge of theft of honest services will complement other related crimes such as bribery, extortion, and money laundering. As it relates to land use, honest services fraud can result from accepting seemingly innocuous assistance from acquaintances and returning the favor in the form of official acts. For instance, in *United States v. Wright*,<sup>118</sup> the defendant was the chief of staff to a Philadelphia city councilman while also maintaining his side job as a realtor.<sup>119</sup> Wright’s office was in the same building as Ravinder Chawla, owner of a real estate firm, and Andrew Teitelman, an attorney who did not work for Chawla but whose practice was almost exclusive to representing Chawla’s firm.<sup>120</sup>

The three befriended one another, so when Wright began facing legal and housing trouble while going through a contentious divorce, Chawla and Teitelman assisted him by letting him stay rent free in an

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113. Deirdre Van Dyk, *The Supreme Court’s Ruling on ‘Honest Services’ Theft*, TIME MAGAZINE (June 25, 2010), <http://www.time.com/time/business/article/0,8599,1999768,00.html> (“The honest services law purports to make it a federal crime to deprive someone of honest services to which that person is entitled”).

114. Act of Nov. 18, 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

115. 561 U.S. 358 (2010).

116. *Id.* at 408–09.

117.

[T]here is no doubt that Congress intended § 1346 to reach *at least* bribes and kickbacks. Reading the statute to proscribe a wider range of offensive conduct, we acknowledge, would raise the due process concerns underlying the vagueness doctrine. To preserve the statute without transgressing constitutional limitations, we now hold that § 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law.

*Id.*

118. *United States v. Wright*, 665 F.3d 560 (3d Cir. 2012).

119. *Id.* at 565.

120. *Id.*

apartment and giving him free legal advice.<sup>121</sup> Chawla also promised exclusive commissions on his company's projects to Wright.<sup>122</sup> In return, Wright acted on behalf of Chawla's firm by expediting and granting a zoning variance application, opposing a proposed ordinance that would cripple one of the firm's projects, and passing along knowledge about potential sales of city property before it became public.<sup>123</sup>

A conviction for honest services fraud requires the fact finder to find two things: first, that the donor provided something of value to a public official expecting to receive favorable treatment that would not normally be given, and second, that the official accepted those benefits with the intent to promote the donor's interests.<sup>124</sup> More importantly, for a situation like the one that developed in *Wright*, each quid, or thing "of value," does not need to be directly linked to a quo, or the official act.<sup>125</sup> Instead, a bribe can take the form of a "stream of benefits,"<sup>126</sup> making the statute's reach even more expansive.

In the *Wright* case, Wright received mutual and contemporaneous benefits, including a free stint in an apartment, commissions, and free legal services.<sup>127</sup> Wright was simultaneously using his official position to benefit Chawla and Teitelman by assisting them with zoning issues and offering other political support.<sup>128</sup> In addition to the ethics charges that emerged as a result of these self-dealings and conflicts of interest, criminal charges including honest services fraud and bribery were brought against all three individuals.<sup>129</sup> State and local

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121. *Id.*

122. *Id.*

123. *Id.* at 566.

124. *Id.* at 568 (citing *United States v. Bryant*, 655 F.3d 232, 240–41 (3d Cir. 2011)).

125. *Id.*

126.

[T]he Government is not required to present evidence that attributes each official action to a corrupt payment. It is enough for the [G]overnment to present evidence that shows a *course of conduct* of favors and gifts flowing to a public official in exchange for a *pattern of official actions* favorable to the donor. Thus, payments may be made with the intent to retain the official's services on an 'as needed' basis, so that whenever the opportunity presents itself the official will take specific action on the payor's behalf. The evidence of a *quid pro quo* can be implicit, that is, a conviction can occur if the Government shows that [the defendant] accepted payments or other consideration with the implied understanding that he would perform or not perform an act in his official capacity.

*United States v. Bryant*, 655 F.3d 232, 241 (3d Cir. 2011) (emphasis in original).

127. *Wright*, 665 F.3d at 568.

128. *Id.*

129. *Id.* at 576–577. The Third Circuit determined that the district court judge's jury instructions were erroneous, so the convictions were vacated and the case was remanded for a new trial. *Id.* at 577–78.



attorneys therefore need to be cognizant of federal laws regulating such unethical behavior in order to represent their clients more effectively.

### III. Examples of Criminal Activities in the Land Use Context at the State Level

#### A. Bridgeport Mayor

Joseph P. Ganim served as Mayor of Bridgeport, Connecticut, from 1991 until he was convicted in 2003 of bribery, racketeering, and honest services fraud.<sup>130</sup> During his term Ganim became acquainted with Leonard Grimaldi, the sole proprietor of a public relations company, and Paul Pinto, who was associated with an architecture and engineering firm.<sup>131</sup> Ganim used his inside knowledge of Bridgeport's projects to the economic advantage of Grimaldi and Pinto, who would then provide benefits to Ganim in return.<sup>132</sup> Ganim's role in this scheme was to steer city contracts to companies represented by Grimaldi and Pinto, increasing the benefits to them.<sup>133</sup> By using his position as a public official for personal economic gain, Ganim violated Connecticut's Code of Ethics for Public Officials, which strictly proscribes using one's official position for personal financial gain.<sup>134</sup> By awarding contracts to Grimaldi and Pinto and sharing in their fees, Ganim managed to collect tens of thousands of dollars in cash and gifts<sup>135</sup> from his two co-conspirators. Not surprisingly, this type of ethics violation is also a violation of two federal laws: extortion under the Hobbs Act in violation of § 1951, and bribery involving programs receiving federal funds in violation of § 666. For these criminal offenses, Ganim was sentenced to 108 months imprisonment.<sup>136</sup>

#### B. New Orleans Mayor

In another situation involving ethics violations that led to criminal charges, the former Mayor of New Orleans, C. Ray Nagin, engaged in self-dealing transactions involving kickbacks and other benefits.

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130. *Ganim*, 510 F.3d at 136-37 (2d Cir. 2007).

131. *Id.* at 137.

132. *Id.* at 137-40.

133. *Id.* at 138.

134. CONN. GEN. STAT. § 1-84 (c) (2013).

135. A public official is also prohibited from receiving a "gift," defined as "anything of value," from restricted donors, including those seeking to do business with the department or agency. CONN. GEN. STAT. § 1-79 (e) (2013).

136. *Ganim*, 510 F.3d at 136.

According to the grand jury indictment, Nagin used his position as mayor to approve an ordinance that would allow a retail corporation to purchase certain property.<sup>137</sup> At the same time, Nagin negotiated a business arrangement with the same corporation that would personally benefit his family-owned granite business.<sup>138</sup> Additionally, and similarly to Ganim, Nagin awarded numerous city contracts to contractors (or, in this case, co-conspirators) in exchange for kickbacks and pay-offs, as well as accepted illicit gifts in the form of free granite for his company.<sup>139</sup> These self-dealing actions, along with many others, violated § 1346 by depriving the citizens of New Orleans of honest services and § 666 for bribery involving a federally funded program.<sup>140</sup> In February of 2014, Nagin was convicted on twenty counts of fraud and bribery.<sup>141</sup>

#### IV. Conclusion

Public officials must be on notice that unethical conduct could potentially expose them to criminal liability. Because federal prosecutors and law enforcement officials are taking a more visible role in government corruption, the increased instances of arrests and the resulting media attention show that political corruption in the land use arena is widespread. This culture of corruption, infecting all levels of government, is aptly described in the introduction by a U.S. Attorney as “barnacles on the bottom of a boat”<sup>142</sup> because barnacles will inevitably appear on a boat that takes no preventative measures and will hinder the performance of the boat by causing drag. Similarly, corruption, as a byproduct of human fallibility and susceptibility, appears to be inherent in our system of government; without investigations into and arrests of corrupt public officials, the public’s trust in government will be eroded and the ability of government agencies and officials to get things done would be hampered.

While no area of government at any level is immune from unethical and corrupt conduct, as demonstrated above, with respect to land use

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137. Indictment at 10, *United States v. Nagin*, No. 13-11, 2013 WL 5532516 (E.D. La., Jan. 18, 2013), available at <http://ftpcontent.worldnow.com/wvue/documents/20130118114952280.pdf>.

138. *Id.*

139. *Id.* at 6.

140. *Id.* at 8.

141. Campbell Robertson, *Nagin Guilty of 20 Counts of Bribery and Fraud*, N.Y. TIMES, Feb. 12, 2014, [http://www.nytimes.com/2014/02/13/us/nagin-corruption-verdict.html?\\_r=0](http://www.nytimes.com/2014/02/13/us/nagin-corruption-verdict.html?_r=0).

142. Odato, *supra* note 7.

in particular, criminal liability can emerge from ethics violations such as self-dealing or conflicts of interest. Without even a basic understanding of the public corruption statutes set forth above, a municipal attorney can unknowingly compound the penalties for a public official client who faces charges of ethics infractions perceived to be merely civil in nature. This issue is significant in light of the increase in federal attention to government corruption and the correspondingly high number of convictions in general and specifically in the land use context.<sup>143</sup>

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143. See PUB. INTEGRITY SECTION, *supra* note 5.



# Recent Developments in Land Use Ethics

Patricia E. Salkin\*

## I. Introduction

CURRENT EVENTS ACROSS THE COUNTRY REVEAL NO SHORTAGE of allegations of unethical conduct in the land use review process. For example, in the Northeast, the mayor of Trenton, New Jersey was convicted on six federal corruption counts for soliciting bribes from parking garage developers.<sup>1</sup> In Newark, New Jersey, a high-profile case that came to light five years ago with the arrests of dozens of corrupt politicians, ended quietly when the final defendant in the biggest federal corruption sting in New Jersey history admitted she pocketed a portion of the \$15,000 in cash a federal informant gave her campaign in exchange for her vote on a bogus real estate project.<sup>2</sup> In the town of Nutley, New Jersey, a resident raised conflict of interest concern because the Nutley Planning Board Chairman is married to the Nutley Zoning Board Attorney.<sup>3</sup> In Connecticut, a local resident filed a complaint seeking to overturn the Planning and Zoning Commission-approved football field project because a commission member who took part in the vote had an apparent conflict of interest given his past involvement with the Darien Athletic Foundation and the Darien Junior Football League.<sup>4</sup> In Rhode Island, a judge ruled that the Woonsocket Zoning Board of Review failed to give a developer a fair hearing by allowing a board member with business and political connections to an opponent

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\* Dean and Professor of Law at Touro Law Center. Special thanks to Touro Law Students Andrew Wilson, Gillian Holland, and Michael Henry for their research assistance.

1. Jenna Pizzi, *Trento Mayor Tony Mack Found Guilty on All Counts in Federal Corruption Trial*, NJ.COM TRUE JERSEY (Feb. 7, 2014, 5:40 PM), [http://www.nj.com/mercer/index.ssf/2014/02/trenton\\_mayor\\_tony\\_mack\\_is\\_found\\_guilty\\_of\\_corruption.html](http://www.nj.com/mercer/index.ssf/2014/02/trenton_mayor_tony_mack_is_found_guilty_of_corruption.html).

2. Ted Sherman, *Sweeping NJ Corruption and Money Laundering Sting Finally Ends with One Last Plea Deal*, NJ.COM TRUE JERSEY (Apr. 29, 2014, 6:15 AM), [http://www.nj.com/news/index.ssf/2014/04/sweeping\\_nj\\_corruption\\_and\\_money\\_laundering\\_sting\\_finally\\_ends\\_with\\_one\\_last\\_plea\\_deal.html](http://www.nj.com/news/index.ssf/2014/04/sweeping_nj_corruption_and_money_laundering_sting_finally_ends_with_one_last_plea_deal.html).

3. Hasime Kukaj, *Two Nutley Residents Take Government to Task*, NORTHJERSEY.COM (May 9, 2014, 11:47 AM), <http://www.northjersey.com/news/education/two-residents-take-government-officials-to-task-1.1011504?page=all>.

4. Melvin Mason, *Darien Selectmen OK \$4 million Turf Fields Gift*, DARIENTIMES.COM (May 6, 2014), <http://www.darientimes.com/31239/darien-selectmen-ok-4-million-turf-fields-gift/>.

of his housing proposal to vote on the project.<sup>5</sup> The Rhode Island Ethics Commission fined the Rhode Island Speaker of the House, Gordon Fox, \$1,500 for violating the state's code of ethics when he did not report income for legal work with the Providence Economic Development Partnership.<sup>6</sup> In Massachusetts, a former Planning Board member in Chelmsford was fined \$5,000 for violating the state's conflict of interest laws by representing clients in two lawsuits against the town.<sup>7</sup>

This problem is not confined to the Northeast. A Fredericksburg, Virginia Planning Commissioner submitted his resignation after he was pressured to resign by the city attorney because of conflicts of interest.<sup>8</sup> In North Carolina, the mayor of the state's largest city was indicted on public corruption charges after accepting more than \$48,000 in bribes from FBI agents posing as real estate developers.<sup>9</sup> A Gastonia City councilman reportedly made a controversial vote on a request to rezone after he received a \$250 campaign contribution from the local developer.<sup>10</sup>

In Missouri, a Camden County Associate District Commissioner is currently denying an alleged conflict of interest in an ongoing legal dispute between the county and the developer of an establishment.<sup>11</sup> The mayor of Fort Collins, Colorado is currently contemplating whether or not she should participate in the debate regarding a plan

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5. Katie Mulvaney, *Judge Orders Woonsocket Zoning Board to Reconsider Developer's Housing Proposal*, PROVIDENCE JOURNAL (Nov. 25, 2013, 1:00 AM), <http://www.providencejournal.com/breaking-news/content/20131125-judge-orders-woonsocket-zoning-board-to-reconsider-developers-housing-proposal.ece>.

6. *NEW: Fox Fined \$1500 by Ethics Commission for PEDP Non-Disclosure*, GO-LOCAL PROV NEWS (Jan. 28, 2014), <http://www.golocalprov.com/news/new-fox-fined-1500-by-ethics-commission-for-pedp-non-disclosure/>.

7. Grant Welker, *State Fines Ex-Chelmsford Planning Boardmember McClure \$5G in Ethics Breach*, LOWELLSUN.COM (Aug. 27, 2013, 7:19:56 AM), [http://www.lowellsun.com/news/ci\\_23952577/state-fines-ex-chelmsford-planning-board-member-mcclure](http://www.lowellsun.com/news/ci_23952577/state-fines-ex-chelmsford-planning-board-member-mcclure).

8. *Fredericksburg Planning Commissioner Submits Resignation*, FREDERICKSBURG.COM (Apr. 29, 2014, 1:21 PM), <http://news.fredericksburg.com/citybeat/2014/04/29/fredericksburg-planning-commissioner-submits-resignation/>; *see also* Pamela Gould, *Mayor Urges Planning Commissioner to Resign*, FREDERICKSBURG.COM (Apr. 29, 2014, 1:00 PM), <http://news.fredericksburg.com/newsdesk/2014/04/29/mayor-urges-planning-commissioner-to-resign/>.

9. Mitch Weiss, *Charlotte Mayor Patrick Cannon Indicted on Public Corruption Charges*, HUFFINGTON POST (Mar. 26, 2014, 2:02 PM), [http://www.huffingtonpost.com/2014/03/26/patrick-cannon-indicted\\_n\\_5036527.html](http://www.huffingtonpost.com/2014/03/26/patrick-cannon-indicted_n_5036527.html).

10. Michael Barrett, *City Council Votes on Rezoning Issue Raise Questions About Ethics*, GASTON GAZETTE (May 1, 2014, 4:25 PM), <http://www.gastongazette.com/spotlight/city-council-votes-on-rezoning-issue-raise-questions-about-ethics-1.313593>.

11. Amy Wilson, *PAC Accuses Luber of Conflict of Interest in Ongoing Legal Case*, LAKE NEWS ONLINE (Feb. 24, 2014, 4:30 PM), <http://www.lakenewsonline.com/article/20140227/News/140228776>.

to revitalize a mall because she has a conflict of interest.<sup>12</sup> In Texas, a San Marcos Planning and Zoning vice chair, was charged with a conflict of interest and brought before the Ethics Review Commission.<sup>13</sup> In Kentucky, not only did a Louisville ethics panel refer a conflict to Metro Council due to three ethics complaints regarding votes the Metro Council President made in voting cases involving zoning,<sup>14</sup> but in McCracken County officials were indicted in a zoning case involving unauthorized zone changes in the county that affected at least 500 pieces of property.<sup>15</sup> In Florida, two planning board members in Hollywood quit after a conflict of interest warning from the city attorney.<sup>16</sup>

Sadly, there are countless other media accounts of alleged and proven conflicts of interest and other ethical misconduct. In this annual review of reported decisions involving ethics in land use, recent decisions are discussed in the hopes that municipal attorneys will use this information as the basis of ongoing training for members of planning boards, zoning boards, and local legislative bodies who must be routinely reminded of not only their legal but ethical responsibilities in upholding the public trust.

## II. Conflicts of Interest

### A. *Members of a Church and a Board Member with an Elderly Mother*

In an unreported decision of the New Jersey appellate division, a plaintiff sought to disqualify the mayor and a councilmember from voting on an ordinance involving a redevelopment plan that would include an assisted living facility as a permitted use on a parking lot adjacent to the Unitarian Universalist Congregation Church where both

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12. Kevin Duggan, *Fort Collins Mayor Not Sure About Joining Mall Debate*, COLORADOAN (May 5, 2014, 6:13 PM), available at <http://www.coloradoan.com/story/news/local/2014/05/05/fort-collins-mayor-sure-joining-mall-debate/8744205/>.

13. James Carniero, *Officials Review Alleged Conflict of Interest*, THE UNIVERSITY STAR (Sept. 12, 2013, 12:14 AM), available at <https://star.txstate.edu/node/735>.

14. Marcus Green, *Louisville Ethics Panel Refers Conflict of Interest Opinion to Metro Council*, WDRB.COM (Mar. 20, 2014, 5:19 PM), <http://www.wdrb.com/story/25032672/louisville-ethics-panel-refers-conflict-of-interest-opinion-to-metro-council>.

15. *McCracken County Officials Indicted in Zoning Case*, WHAS11.COM NEWS (Jan. 11, 2014, 5:33 PM), <http://www.whas11.com/news/local/239661171.html>.

16. William Gjebre, *Hollywood Planning Board Members Quit After Conflict of Interest Warning from City Attorney*, BROWARD BULLDOG (Mar. 3, 2014, 6:25 AM), <http://www.browardbulldog.org/2014/03/hollywood-planning-board-members-quit-after-conflict-of-interest-warning-from-city-attorney/>.

individuals were members.<sup>17</sup> Further, the mayor had reportedly commented that, "it would be beneficial for his elderly mother if an assisted living facility were constructed in town."<sup>18</sup> The trial court dismissed the complaint, and on appeal, the plaintiff contended that there was still an issue as to whether the council members' affiliation with the church impaired their objectivity or independence of judgment in passing the ordinance.<sup>19</sup> The New Jersey Municipal Land Use Law states that, "[n]o member of the board of adjustment shall be permitted to act on a matter in which he has, either directly or indirectly, any personal or financial interest."<sup>20</sup> However, not all interests possess the same capacity to tempt a public official, and a remote and speculative interest will not disqualify an official.<sup>21</sup> In fact, the New Jersey Supreme Court has identified four situations where the statutory provision would preclude action by a board member:

- (1) 'Direct pecuniary interests,' when an official votes on a matter benefitting [sic] the official's own property or affording a direct pecuniary gain;
- (2) 'Indirect pecuniary interests,' when an official votes on a matter that financially benefits one closely tied to the official, such as an employer, or family member;
- (3) 'Direct personal interest,' when an official votes on a matter that benefits a blood relative or close friend in a non-financial way, but a matter of great importance, as in the case of a councilman's mother being in the nursing home subject to the zoning issue; and
- (4) 'Indirect Personal Interest,' when an official votes on a matter in which an individual's judgment may be affected because of membership in some organization and a desire to help that organization further its policies.<sup>22</sup>

Here the court found that the council members' mere membership in the church, and the fact that one of them made a comment that his mother could potentially benefit from the development were indirect

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17. *Grabowsky v. Township of Montclair*, 2013 WL 3835357 (NJ Super. Ct. App. Div. 2013).

18. *Id.* at 1. *See generally* *Care of Teneffly, Inc. v Teneffly Bd. of Adjustment*, 704 A.2d 1032 (N.J. Super. Ct. App. Div. 1998), certif. denied, 713 A.2d 500 (N.J. 1998) (discussing common law approach to when a zoning board member's interest disqualifies them from participating in zoning proceedings).

19. *Grabowsky*, 2013 WL 3835357, at \*1 (NJ Super. Ct. App. Div. 2013).

20. N.J. REV. STAT. § 40:55D-69 (2004).

21. *Grabowsky*, 2013 WL 3835357, at \*3 (citing *Haggerty v Red Bank Borough Zoning Bd. of Adjustment*, 897 A.2d 1094, 1100-01 (N.J. Super. Ct. App. Div. 2006)).

22. *Grabowsky*, 2013 WL 3835357, \*3-4 (citing *Wyzykowski v Rizas*, 626 A.2d 406, 414-15 (1993)).



interests and too speculative, and failed to show a disqualifying conflict of interest.<sup>23</sup> The court further pointed out that the Church was not even the applicant, nor a party in the matter, and that the claim that the Church would benefit from “having immobile, elderly neighbors next door,” was too far a stretch.<sup>24</sup> Lastly, the mayor’s statement about his mother failed to show that he had pre-judged the issue.<sup>25</sup>

## B. *Attorney Conflicts of Interest*

### 1. CHANGING CLIENTS

Kane Properties, LLC sought several variances to develop property in Hoboken, New Jersey and Skyline Condominium Association, Inc., represented by Michael Kates, was a major opponent to the project.<sup>26</sup> The Zoning Board of Adjustment held several hearings regarding the application where Kane and Skyline provided evidence both for and against the project and Kates actively participated, opposing the project on behalf of Skyline.<sup>27</sup> After a unanimous vote, the board ultimately approved all of Kane’s applications.<sup>28</sup> Skyline appealed the board’s decision to the city council and shortly thereafter Kates was appointed to serve as the legal advisor to the council and was replaced by W. Mark O’Brien as counsel for Skyline.<sup>29</sup> Kates wrote a letter to both Kane and Skyline, informing them of the procedures of the appeals process and Kane immediately objected to Kates being involved in the appeal, claiming that it was a conflict of interest since Kates had previously served as counsel for Skyline.<sup>30</sup> Edward J. Buzak, of the council responded, advising that Kates had recused himself from the appeal and that he, Buzak, would be taking Kates’ place.<sup>31</sup> Kates’ conflict of interest remained undisputed by the parties and in February of 2010, Kates sent a legal memorandum to the members of the council explaining the procedures to be taken regarding appeals of zoning board decisions, to

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23. See *Grabowsky*, 2013 WL3835357, at \*3-4.

24. *Id.* at \*4.

25. *Id.* at \*4.

26. *Kane Properties, LLC v. City of Hoboken*, 68 A.3d 1274 (N.J. 2013).

27. See *id.* at 1279.

28. *Id.*

29. *Id.*

30. *Kane Properties*, 68 A.3d at 1279-80.

31. *Id.* at 1280.

which Kane again objected.<sup>32</sup> In March of 2010, Buzak appeared at a hearing for the Kane-Skyline appeal and Kates did not appear.<sup>33</sup> After the hearing, the Council reversed the Board's decision, resulting in all but one of Kane's variances being denied.<sup>34</sup> Shortly thereafter, at a council meeting regarding their recent decision, Kates served as counsel for the city instead of Buzak.<sup>35</sup> Kates actively participated in this meeting and even signed and approved the council's resolution.<sup>36</sup> The resolution listed six specific reasons in support of their decision to reverse the board's approval of the variances, concluding that Kane failed to demonstrate that the property was "particularly suitable" for its intended use.<sup>37</sup>

Kane sued the city and its council alleging, among other things, that Kates' involvement in the appeal constituted a conflict of interest that "irreparably tainted and thoroughly undermined the City Council's decision."<sup>38</sup> In support, Plaintiff cited the memorandum sent by Kates regarding the present appeal; Kates' presence and participation in the meeting following the council's decision; and Kates' signing and approval of the resolution.<sup>39</sup> The trial court determined that Kates' conflict of interest did not taint the council's decision, finding that the memorandum was merely a procedural act of his administrative capacity and that his involvement in the resolution was too minimal to have affected the council's decision.<sup>40</sup>

The appellate court reversed, finding that Kates' participation and conflict of interest did taint the council's determination.<sup>41</sup> The court said that the applicable standard should have been whether, "in the mind of a reasonable citizen fairly acquainted with the facts, this scenario would create an appearance of improper influence."<sup>42</sup> Citing to the different ways in which Kates involved himself in the appeal, the court held that such involvement was inappropriate and would

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32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 1281.

38. *Id.* at 1282.

39. *Kane Properties*, 68 A.3d at 1282.

40. *Id.* (The trial court determined that the applicable standard of review was "actual prejudice," not "appearance of impropriety." As such, Plaintiff would need to provide actual evidence of Kates having influenced the council's decision as opposed to a mere appearance of unethical behavior.)

41. *Id.* at 1283.

42. *Id.*

give a “reasonable citizen cause for concern,” and remanded the matter back to the council.<sup>43</sup>

Kane appealed to the supreme court of New Jersey objecting to the remand to the council and defendants cross-appealed, contesting the finding that Kates’ involvement created an appearance of impropriety and tainted the council’s decision.<sup>44</sup> The supreme court first reviewed the issue regarding Kates’ involvement by acknowledging that the conflict of interest is not only undisputed, but it is also clearly satisfied by the definition provided in the Rules of Professional Conduct.<sup>45</sup> The main issue was whether Kates’ involvement, despite his recusal from the matter, was inappropriate under the circumstances.<sup>46</sup> The court said that while the appearance of impropriety standard is correctly inapplicable to an *attorney’s* conflict of interest, a different standard applies to those acting in a *judicial capacity*.<sup>47</sup> According to the Code of Judicial Conduct, judges are to avoid both “impropriety and the appearance of impropriety in all activities.”<sup>48</sup> Since Kates’ role gave him the “opportunity to interpret the law and advise on legal matters,” the supreme court reasoned that Kates’ responsibilities were “quasi-judicial” enough to require the appearance of impropriety standard.<sup>49</sup> When this standard is applied to Kates’ conduct, the court determined that a reasonable, informed member of the public would indeed question the council’s impartiality and the integrity of the proceedings.<sup>50</sup> In remanding the matter to the trial court for a *de novo* review of the board’s decision, the court also directed that the matter be sent to a different judge who would be unquestionably unbiased and impartial.<sup>51</sup>

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43. *Id.* at 1283-84.

44. *Id.* at 1284.

45. *Kane Properties*, 68 A.3d at 1285. According to the Rules of Professional Conduct, a government lawyer cannot participate in a proceeding in which he had previously been involved while in a non-governmental private capacity. *Id.*

46. *Id.*

47. *Id.* at 1286.

48. *Id.*

49. *Id.* at 1286-87 (The court noted that deciding whether there was an appearance of impropriety requires a determination of whether “a reasonable, fully informed person [would] have doubts about the judge’s impartiality[.]” The judge’s conduct should not give the public any “reason to lack confidence in the integrity of the process and its outcome[.]” No evidence of actual bias or impropriety is required under this standard.).

50. *Id.* at 1286. (Kates acknowledged the conflict of interest and recused himself, and he therefore should not have further participated in the appeal. The court explained that a recusal requires a person to completely dissociate himself from the matter, which Kates failed to do.).

51. *Id.* at 1293.

## 2. FORMER CLIENT

Reszka commenced an action seeking removal of Collins, a council member of the town board of the Town of Hamburg alleging that Collins, an attorney, continued a previously filed claim against the town on behalf of a client after taking office.<sup>52</sup> Reszka also alleged that Collins had a complaint of harassment filed against him for filing repeatedly frivolous actions against the town, and posted flyers advertising his legal practice.<sup>53</sup> Collins refuted the allegations by submitting affidavits attesting to the fact that he has not appeared in court since taking an elected position, and Reszka did not provide further evidence to the contrary.<sup>54</sup> The court dismissed the petition, finding that this type of behavior, even if it were true, did not constitute grounds for removing an official from office as the allegations did not demonstrate unscrupulous conduct, a gross dereliction of duty, or a pattern of misconduct and abuse of authority.<sup>55</sup>

### *C. Conflict of Interest Based on Business Investment*

A conflict of interest question arose in a dispute over an ordinance that regulated and restricted non-metered parking in certain districts that were close to the boardwalk and its commercial attractions whereby only those persons who were qualified residents within the district were permitted to park in non-metered spaces from 12:30 a.m. to 4:00 a.m.<sup>56</sup> The primary purpose of the ordinance was to prevent non-residents from entering into the neighborhoods at night while loitering in the streets, wandering drunkenly, and to prevent the degrading of property value.<sup>57</sup> A councilman who was to vote on the newly proposed ordinance was also an owner of a business that owned houses within the district that the ordinance was to be imposed where he had lived for 51 years.<sup>58</sup> Objectors of the ordinance claimed that the councilman had a conflict of interest because of his property within the district and the possibility for him to earn additional fees once the ordinance is passed.<sup>59</sup> The councilman stated that he did not

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52. Reszka v. Collins, 109 A.D.3d 1134 (N.Y. App. Div. 2013).

53. *Id.*

54. *Id.* at 1135.

55. *Id.*

56. Speroni v. Borough of Point Pleasant Beach, 2013 N.J. Nos. OCNL313512, OCN-L-1719-12, 2013 WL 3878558, at \*1 (N.J. Super. Ct. Law Div. June 17, 2013).

57. *Id.*

58. *Id.* at \*4.

59. *Id.* at \*7.

have a conflict of interest and, at the close of the final hearing, the ordinance passed by a vote of 4-3.<sup>60</sup>

In deciding whether the councilman was required to disqualify himself from the voting board, the Superior Court of New Jersey ruled that there is a conflict of interest if an individual has a direct or indirect pecuniary interest, or when there is a direct personal interest, or indirect personal interest.<sup>61</sup> The superior court noted that a local government official should not act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.<sup>62</sup> The court found that the councilman had a conflict of interest because he acknowledged he would receive a direct financial benefit, and that his pecuniary interest derived from his business relationship and ownership in the property, and this interest could reasonably impair his objective judgment.<sup>63</sup>

*D. No Unethical Conflict of Interest by  
Board Member Who Had Previous Business  
Dealing with Applicant*

Saratoga Springs Preservation Foundation (Foundation) is a not-for-profit organization that preserves historic structures in Saratoga Springs.<sup>64</sup> In September 2008, Boff purchased a piece of property, Winans-Crippen House, in a historic area of the city.<sup>65</sup> The house was recognized as a historic structure and listed on the National Register of Historic Places. Boff sought to demolish the house because it was an unsafe structure. The Saratoga Springs Design Review Commission (DRC) deemed itself responsible for overseeing such a request pursuant to the State Environmental Quality Review Act (SEQRA). The DRC found the requested demolition was a “type I” action and issued a positive declaration of environmental significance. It also required Boff to submit a draft environmental impact statement, which

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60. *Id.* at \*13.

61. *Id.* at \*20.

62. *Id.*

63. *Id.*

64. *Saratoga Springs Pres. Found. v. Boff*, 110 AD3d 1326 (N.Y. App. Div. 2013).

65. *Id.*

he complied with in June 2012, and the DRC voted to accept in November 2012.

In December 2012, the Foundation and four individuals commenced an Article 78 proceeding against the city, Boff, and individual members of the DRC challenging the SEQRA determination and seeking an order enjoining the demolition of the house. The DRC voted to approve Boff's demolition application permit, and petitioners brought an additional claim challenging that determination as well. Petitioners argued that one of the four voting members of the DRC had a conflict of interest that should have disqualified him according to the City's Code of Ethics.<sup>66</sup> Specifically, petitioners relied on a portion of the code, which dealt with a city officer having knowledge or having a reason to know that he would receive a personal financial benefit from action taken for a client.<sup>67</sup> The petitioners were referring to a particular DRC member's business relationship with Boff. The member, Richard Martin, had been under contract with Boff on an unrelated construction project two years prior, disclosed this information, and found that recusal was not required.<sup>68</sup> Boff had hired a general contractor and that general contractor hired Martin's construction company for other work.<sup>69</sup> Martin stated that during the time Boff's demolition permit application was pending they were unaware of their business relationship. The court found that because they did not know of their business relationship, nor should they have known, and because the decision on Boff's application occurred two years after their business relationship concluded, Martin was not disqualified for a conflict of interest.

#### *E. Potential Conflicts Must Be Raised Timely*

Richard Dahm submitted an application to the Stark County Board for a zoning amendment to change his property from agricultural to residential to create a 99-lot residential subdivision.<sup>70</sup> After several public hearings, the board denied Dahm's application by a 5-0 vote. On appeal Dahm argued that two of the commissioners had conflicts of interest stemming from their own land development projects, and prejudice against Dahm's competing project.<sup>71</sup> Dahm argued that both of

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66. *Id.* at 840.

67. *Id.*

68. *Id.*

69. *Id.*

70. Dahm v. Stark Cnty. Bd. of Cnty. Comm'rs, 841 N.W.2d 416, 419 (N.D. 2013).

71. *Id.* at 420.

the commissioners separately contracted with developers to turn land in the vicinity of Dahm's project from commercial to residential, however Dahm did not raise this potential conflict of interest to the board and attempted to raise it for the first time in the district court.<sup>72</sup> The court found that the information Dahm sought to introduce was merely speculative, and could not be raised for the first time on appeal.<sup>73</sup>

### III. Recusal and Disqualification

#### *A. Recusal Not Required for Three Board of Supervisors Members Who Disclosed Relationships With Governmental Applicant and its Attorney*

In 2010, Iskalo CBR, LLC ("Iskalo") filed an application for a special exception to build a Washington Metropolitan Area Transit Authority ("WMATA") bus maintenance facility on a parcel of land in Fairfax County.<sup>74</sup> After a public hearing, the planning commission approved the facility as being substantially in accord with the comprehensive plan and thus recommended approval of the application by the board of supervisors. The plan was not well received by the inhabitants of Newberry Station, a residential community situated a mile from the proposed facility and less than a quarter-mile from the road over which the bus traffic would flow. Newberry Station contended throughout the approval process that the facility would significantly increase vehicular traffic over the road, both due to the buses and the cars of employees, throughout the day and night. The Newberry Station Homeowner's Association submitted official comments to the board, recommending they overturn the planning commission's approval.

The board approved the application but not before three of its members made disclosures to the public regarding their personal or professional interest or relationship with the project itself or Iskalo. The board's chairman and a supervisor disclosed that they had received campaign contributions from Iskalo's attorneys and two other members disclosed that they were directors of WMATA. The vote passed 6-3 with the board's chairman abstaining from the vote while the three supervisors who had made disclosures voting to approve the application.

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72. *Id.*

73. *Id.* at 424.

74. *Newberry Station Homeowners Ass'n v. Bd. of Supervisors*, 285 Va. 604 (2013).

The Newberry Station Homeowners Association filed a complaint seeking declaratory judgment that the board's approval of the application was void and injunction barring construction of the facility. They argued that the county code required the interested board members to recuse themselves from consideration of the application. The board argued that the code did not require the supervisors to recuse themselves because they did not have a conflicting business or financial interest covered by the statute. The circuit court sustained the board's argument and Newberry Station appealed.

Newberry Station's main argument was that the interested supervisors were required to recuse themselves from consideration because they each had a conflict of interest. The board's argument in response is the language of the statute, which provides that recusal pertains to instances where there is a "business or financial relationship" and does not require recusal for "business or financial interest." This issue, being statutory in nature, led the court to first analyze whether the plain meaning of the statute could determine whether there is a clear difference between the use of relationship and interest. The court, after determining the language of the statute to be ambiguous looked to the legislative history of the statute and determined that there was no intent by the legislature for the two phrases to have different meanings. However, the court affirmed the circuit court's decision because WMATA is a governmental agency created by a pact between Maryland, Virginia, and Washington D.C. and as such it affords no opportunity for financial benefit to its unpaid directors. Without the financial benefit to its directors, WMATA does not fall under the statute's definition of "corporation". Thus, the court held it was not improper for the supervisors to participate in the consideration process.

Newberry Station also argued that the board approved the application without sufficient evidence. In particular they alleged that the board's actions were arbitrary and capricious because they were undertaken in violation of an existing ordinance. The court rejected this argument, stating that the special exception application was within the authority granted to the board and therefore was not in violation of an ordinance. Newberry Station also argued that the board had failed to properly consider open space, noise, and hazardous materials. The court rejected these contentions because there was ample evidence of consideration of open space and noise, while the statute at issue placed no burden on the board to consider the hazardous materials; instead it places an obligation on the applicant to list toxic substances.



*B. Board Member's Recusal from Voting Because He Was Previously Employed by Applicant Was Sufficient*

Gunnery, a private boarding school in Connecticut, submitted an application to the Wetlands and Watercourse Commission (IWC) for a permit to construct athletic fields; and it was approved subject to conditions.<sup>75</sup> Gunnery then applied to the Washington Zoning Commission (WZC) for a special permit to have construction done on the property, and following several hearings, the WZC ruled that the project was consistent with the Washington Plan of Conservation and Development as it balanced the needs of the school and the town.<sup>76</sup> The board then voted in favor of the application with one of the board members, Reich, recusing himself from voting due to his past experience as a teacher at the school and his involvement with the defendants.<sup>77</sup> Reich, however, did not recuse himself from the case, because, he stated, he had retired from the school six years before he joined the WZC, and he currently had no ties with the school.<sup>78</sup> Plaintiff argued that the WZC demonstrated clear bias, but the defendant responded that the plaintiff failed to establish the Reich was predisposed on the matter.<sup>79</sup> In deciding whether the commissioners had their minds made up prior to the public hearing, the Superior Court of Connecticut held that there is a presumption that administrative board members acting in an adjudicative capacity are not biased.<sup>80</sup> As a result, the court dismissed the appeal, finding Reich was truthful in his statements about working as a teacher in the Gunnery school, and that neither Reich's employment as a teacher nor the decision of the school to honor Reich's deceased son rose to the level of a conflict of interest.<sup>81</sup>

*C. Disqualification Based on Prejudgment*

In a recent Rhode Island case, the plaintiff had submitted variance applications on several occasions and each was denied.<sup>82</sup> It was later discovered that, prior to the last hearing, one of the judges told a board

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75. *Stern v. Town of Wash. Zoning Comm'n*, 2013 WL 5496459 at 1 (Conn. Super. Ct. Sept. 11, 2013).

76. *Id.* at 7-8.

77. *Id.* at 8.

78. *Id.* at 11.

79. *Id.* at 9.

80. *Id.* at 14.

81. *Id.* at 13.

82. *Fernandez v. Bruce*, 2013 R.I. Super. LEXIS 184 (RI Sup. Oct. 21, 2013).

member that he already decided to vote against the application a month before the hearing was conducted.<sup>83</sup> The judge's business associate also spoke out publicly against the application. On appeal from the denial, the superior court vacated the zoning board's decision, and the zoning board then determined that the judge did not have to recuse himself due to his business associate's opposition.<sup>84</sup> The superior court disagreed, ruling that it would be more in keeping with justice and fair play to disqualify a judge who objects to a proposed change even before the hearing, and that the judge should be disqualified because he had already decided how he was voting before the hearing.<sup>85</sup>

#### IV. Bribery

A recent trend in reported cases reveals an alarming increase in federal corruption cases involving land use permits.<sup>86</sup> A number of federal laws are used to ferret out corruption including title 18 U.S.C. § 201(b), which prohibits bribery and the acceptance of certain gratuities.<sup>87</sup> Bribery may manifest itself in cash given in exchange for permits,<sup>88</sup> services in exchange for approvals,<sup>89</sup> and campaign contributions.<sup>90</sup> Other federal statutes that have been used to convict corrupt actors in the land use game include: the Hobbs Act,<sup>91</sup> theft of honest services,<sup>92</sup> and bribery involving federally funded programs.<sup>93</sup>

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83. *Id.* at 18.

84. *Id.* at 1-2

85. *Id.* at 17.

86. See Patricia Salkin & Bailey Ince, *It's a "Criming Shame": Moving from Land Use Ethics to Criminalization of Behavior Leading to Permits and Other Zoning Related Acts*, 46 URB. LAW. 249-67 (2014).

87. 18 U.S.C. § 201(b) (2012). For an explanation, see *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404-05 (1999).

88. See, e.g., *United States v. Curescu*, 2011 WL 2600572 (N.D. Ill. June 29, 2011).

89. See, e.g., *United States v. Boender*, 649 F.3d 650 (7th Cir. 2011).

90. See, e.g., *United States v. Beldini*, 443 Fed. App'x 709, 710 (3d Cir. 2011); *United States v. Boone*, 628 F.3d 927 (7th Cir. 2010).

91. 18 USC § 1951 (2012). A public official is guilty of extortion under color of official right when he or she induces someone to relinquish their property in order to perform some act the official was already under a duty to perform. See *Evans v. United States*, 504 U.S. 225, 273 (1992).

92. 18 U.S.C. § 1346 (2012).

93. 18 U.S.C. § 666 (2012).

*A. Promise of Donation to Charity and Threat of Lawsuit If Opposition to Rezoning*

Issa, a developer seeking rezoning to develop an IHOP restaurant told city council member Benson that he would make a donation to charity upon the closing of the IHOP property, but Benson was not amenable to the request.<sup>94</sup> Issa then told Benson he would sue the council if Benson were going to garner opposition to the rezoning.<sup>95</sup> Benson informed the council of Issa's attempt to bribe him prior to the council voting on the property, and the council denied the rezoning.<sup>96</sup> Issa then sued the councilman for allegedly defaming him on two separate occasions when the councilman accused Issa of offering a bribe to influence Benson's vote on the rezoning issue.<sup>97</sup> The Tennessee Court of Appeals agreed with Councilman Benson that his statements were protected under both legislative and litigation privilege.

*B. Another Distressing Corruption Scheme*

Federal law prohibits local and state government agents from "corruptly solicit[ing] or demand[ing] for the benefit of any person, or accept[ing] or agree[ing] to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such . . . government . . . involving any thing of value of \$5,000 or more."<sup>98</sup>

Fourteen defendants were indicted by a federal grand jury in September 2007 on various counts, including bribery, extortion, money laundering, and fraud. Of these fourteen defendants, Darren Reagan, D'Angelo Lee, Donald Hill, and Sheila Farrington appealed.<sup>99</sup> Hill was an elected member of the City Council of Dallas, Texas, and Lee was appointed by Hill to the City Plan and Zoning Commission ("CPC").<sup>100</sup> Farrington was Hill's mistress and future wife, who acted as a consultant under the business name Farrington & Associates.<sup>101</sup> Reagan was the chairman and chief executive of the Black State Employees Association of Texas and the BSEAT Community Development Corporation, and Brian Potashnik and James Fisher were two housing developers who were involved in illegal activity

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94. Issa v. Benson, 420 S.W.3d 23 (Tenn. Ct. App. 2013).

95. *Id.*

96. *Id.*

97. *Id.*

98. United States v. Reagan, 725 F.3d 471, 481 (2013).

99. *Id.* at 477.

100. *Id.*

101. *Id.*

with appellants in attempts to obtain “public financing, zoning clearance, and political support for their rival housing development plans in Dallas.”<sup>102</sup>

In order to gain political support from Hill for his housing developments, Potashnik hired Farrington as a “community consultant.”<sup>103</sup> Potashnik paid Farrington regularly, even though Farrington never did any work for him and instead used the money to buy cars for Hill and Lee.<sup>104</sup> Hill promised Potashnik that, in return, Hill would push the council to finance one of Potashnik’s developments.<sup>105</sup> Lee then requested that Potashnik hire a woman named Andrea Spencer as a minority contractor, who did no work herself but partnered with a white male contractor named Ron Slovacek.<sup>106</sup> After Spencer and Slovacek were given a concrete contract, Hill pushed the council to fund two of Potashnik’s developments and obtain permits for a different development.<sup>107</sup> As it later turned out, Lee had been taking 10% of Slovacek’s checks.<sup>108</sup> In exchange for Potashnik’s working out another deal with Spencer and Slovacek, Lee and Hill offered to push a proposal to the council that would reduce certain zoning requirements in one of Potashnik’s developments, and when the proposal did not pass, Potashnik refused to enter into a contract with Spencer and Slovacek.<sup>109</sup>

Appellants were also involved in similar illegal schemes with Fisher, Potashnik’s rival.<sup>110</sup> In August of 2004, Reagan asked Fisher for portions of his developer’s fee, and in exchange, “Reagan would ensure that Fisher would not have problems with Hill and the City Council.”<sup>111</sup> Later that October, several zoning rulings were made that negatively affected Fisher’s developments and days later when Fisher refused to contribute money to fund Hill’s birthday party, a CPC vote that would affect Fisher was postponed.<sup>112</sup> Fisher signed a contract with Reagan in November of 2004, which resulted in the council’s approval to finance one of Fisher’s developments, Pecan

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102. *Id.*

103. *United States v. Reagan*, 725 F.3d at 478.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 478-79.

110. *Id.* at 479.

111. *United States v. Reagan*, 725 F.3d at 479.

112. *Id.*

Grove.<sup>113</sup> Thereafter, two inexperienced contractors, Rickey Robertson and Jibreel Rashad, told Fisher that if they were to serve as subcontractors on the Pecan Grove project, Lee would get the CPC to approve another one of Fisher's projects.<sup>114</sup> Fisher refused to deal with Robertson and Rashad after learning that they (1) expected Fisher to cut them in on 10% of the projects' value and (2) planned to subcontract out all the work given to them. Reagan sent invoices to Fisher requesting payment for various alleged services.<sup>115</sup> When Fisher refused to pay, Hill delayed another council vote on one of Fisher's projects.<sup>116</sup> In February 2005, Reagan demanded more fees from Fisher and named subcontractors that he wanted Fisher to use and, although Fisher refused these requests, he did pay Reagan a portion of the requested amount.<sup>117</sup> The FBI photographed Reagan handing an envelope with \$10,000 to Hill, who gave \$5,000 to Farrington, who gave \$2,500 to Lee.<sup>118</sup> Hill further delayed the votes on one of Fisher's developments and Reagan demanded more money from Fisher.<sup>119</sup> The FBI took photographs of Reagan giving \$7,000 to Lee, \$2,500 of which was deposited into Hill's campaign account the following day.<sup>120</sup>

Fisher was then told that if he worked together with Kevin Dean, owner of an asphalt company, and John Lewis, an attorney, Hill would approve one of Fisher's development projects.<sup>121</sup> After Fisher signed a contract with Lewis and made an initial payment of \$50,000, Hill was successful in getting zoning approval for Fisher's development.<sup>122</sup>

After reviewing the foregoing evidence at trial, the jury found Hill, Lee, and Farrington guilty on several counts of fraud, bribery, and conspiracy to launder money.<sup>123</sup> All four appellants were also found guilty for extortion.<sup>124</sup> The substantive issues on appeal dealt with evidentiary sufficiency,<sup>125</sup> and for purposes of this review are not relevant.

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113. *Id.* at 479.

114. *Id.*

115. *Id.* at 480.

116. *Id.* at 479-80.

117. *Id.* at 480.

118. *Id.*

119. *United States v. Reagan*, 725 F.3d at 480.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* 480-81.

124. *Id.*

125. *Id.* at 481.

*C. Revocation of Host Community Agreement  
Following Bribery Upheld*

In an earlier proceeding, plaintiff was found to have engaged in a criminal conspiracy to bribe a city council member, and it was determined that the bribe resulted in the council member's changing of votes towards the plaintiff's zoning plan.<sup>126</sup> As a result, the plaintiff's conditional use grant for the host community agreement was revoked. The plaintiff appealed claiming that he still had an interest in the land, therefore, the city must return payments that were made under the host community agreement.<sup>127</sup> In denying the plaintiff's motion, the court found it was a matter of fact that there were apparent acts of bribery involved in procuring the host community agreement.<sup>128</sup> The city's ultimate denial of the host community agreement did not unjustly enrich the city, because the host community agreement would have expired on its own terms and the plaintiff made no efforts to rescind the agreement.<sup>129</sup>

*D. Miscellaneous*

1. AICP CODE OF ETHICS DOES NOT ESTABLISH A  
LEGAL DUTY OF ENFORCEABLE STANDARD OF CARE

In a recent Colorado case, plaintiff hired the defendant for land planning and development services to provide a development analysis for properties owned by the plaintiff.<sup>130</sup> The defendant then filed a claim against the plaintiff, stating that the plaintiff gave inaccurate advice about how the properties would be developed, and the plaintiff also filed a claim against the defendant for breach of contract.<sup>131</sup> The Colorado Court of Appeals ruled that an expert's opinion as to the best practices and ethics of a type of service does not necessarily establish a legally enforceable duty of care independent of the applicable agreement, and that the American Institute of Certified Planners code does not establish a legal duty or an enforceable standard of care independent of those in the agreement.<sup>132</sup>

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126. *Systematic Recycling, LLC v. City of Detroit*, No. 09-11430, 2013 WL 425431 (E.D. Mich. Jan. 24, 2013).

127. *Id.*

128. *Id.*

129. *Id.* at \*12-13.

130. *Stan Clauson Assocs., Inc. v. Coleman Bros. Constr., LLC*, 297 P.3d 1042, 1044 (Colo. Ct. App. 2013).

131. *Id.* at 1044.

132. *Id.* at 1047-48.

2. EX PARTE COMMUNICATION WAS INAPPROPRIATE  
BUT DID NOT TAINT BOARD'S DECISION

Berwick Iron operated a metal and automobile recycling business in a rural commercial and industrial district under a conditional use permit for automobile recycling.<sup>133</sup> In 2010, Berwick Iron applied for and received another conditional use permit to install and operate a metal shredder.<sup>134</sup> Abutters challenged the board's decision.<sup>135</sup>

The board hired an environmental consulting firm to conduct an independent review of the potential air emissions and sound levels from the facility but because Berwick Iron was required to pay for the environmental firm, the board obtained three estimates from engineering firms to compare prices and the town planning coordinator then contacted the attorney representing Berwick Iron and attached the proposals.<sup>136</sup> The attorney for Berwick Iron responded to the email and stated that the firm with the lowest estimate could proceed with the review.<sup>137</sup> Neither the planning coordinator nor the board informed the public or the attorney for the nine abutting landowners of the email exchange.<sup>138</sup>

After receiving the results of the independent review, the board again voted to approve the conditional use permit for the shredder.<sup>139</sup> The abutters again sought review, and the court vacated the board's decision again on the basis that it violated the abutters' due process rights when it failed to notify the public or the abutters' counsel of the email exchange discussing the choices for an independent reviewer.<sup>140</sup> The board asked the superior court to clarify its decision, and the court stated that although the board did violate due process, it did not influence the outcome of the case, but the board's lack of compliance with its own emissions statute was the reason.<sup>141</sup>

On appeal, the abutters argued that the planning board violated their due process rights when the planning coordinator sent an email only to Berwick Iron.<sup>142</sup> The court stated that, in the context of municipal planning boards, due process means the party is entitled to a fair

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133. *Duffy v. Town of Berwick*, 82 A.3d 148, 151-52 (Me. 2013).

134. *Id.* at 151-52.

135. *Id.* at 153.

136. *Id.*

137. *Id.*

138. *Id.* at 153.

139. *Id.*

140. *Id.*

141. *Id.* at 154.

142. *Id.*

and unbiased hearing.<sup>143</sup> The supreme court agreed with the superior court that the email did not taint the board's decision because the board had essentially made its decisions and was merely seeking Berwick Iron's approval because it was required to pay for the expert, therefore, the gravity of the ex parte communication was limited.<sup>144</sup> The court also noted that the abutters had the opportunity to respond to the choice of independent reviewer during the public hearing. The court concluded that the ex parte communication was not enough to require the court to vacate the board's decision.<sup>145</sup>

## **V. Conclusion**

The Land Use Ethics Committee of the ABA Section on State and Local Government Law continues to review and discuss new cases in this area on an annual basis. Attorneys representing governments and applicants before governments are welcome and encouraged to participate in this effort to ensure that the land use process proceeds in a transparent, fair, and ethical manner.

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143. *Id.* at 155.

144. *Id.* at 155-56.

145. *Id.* at 156.



# Recent Developments in Land Use Ethics

Patricia E. Salkin\*

## I. Introduction

CURRENT EVENTS ACROSS THE COUNTRY REVEAL NO SHORTAGE of allegations of unethical conduct in the land use review process. For example, in the Northeast, the mayor of Trenton, New Jersey was convicted on six federal corruption counts for soliciting bribes from parking garage developers.<sup>1</sup> In Newark, New Jersey, a high-profile case that came to light five years ago with the arrests of dozens of corrupt politicians, ended quietly when the final defendant in the biggest federal corruption sting in New Jersey history admitted she pocketed a portion of the \$15,000 in cash a federal informant gave her campaign in exchange for her vote on a bogus real estate project.<sup>2</sup> In the town of Nutley, New Jersey, a resident raised conflict of interest concern because the Nutley Planning Board Chairman is married to the Nutley Zoning Board Attorney.<sup>3</sup> In Connecticut, a local resident filed a complaint seeking to overturn the Planning and Zoning Commission-approved football field project because a commission member who took part in the vote had an apparent conflict of interest given his past involvement with the Darien Athletic Foundation and the Darien Junior Football League.<sup>4</sup> In Rhode Island, a judge ruled that the Woonsocket Zoning Board of Review failed to give a developer a fair hearing by allowing a board member with business and political connections to an opponent

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\* Dean and Professor of Law at Touro Law Center. Special thanks to Touro Law Students Andrew Wilson, Gillian Holland, and Michael Henry for their research assistance.

1. Jenna Pizzi, *Trento Mayor Tony Mack Found Guilty on All Counts in Federal Corruption Trial*, NJ.COM TRUE JERSEY (Feb. 7, 2014, 5:40 PM), [http://www.nj.com/mercer/index.ssf/2014/02/trenton\\_mayor\\_tony\\_mack\\_is\\_found\\_guilty\\_of\\_corruption.html](http://www.nj.com/mercer/index.ssf/2014/02/trenton_mayor_tony_mack_is_found_guilty_of_corruption.html).

2. Ted Sherman, *Sweeping NJ Corruption and Money Laundering Sting Finally Ends with One Last Plea Deal*, NJ.COM TRUE JERSEY (Apr. 29, 2014, 6:15 AM), [http://www.nj.com/news/index.ssf/2014/04/sweeping\\_nj\\_corruption\\_and\\_money\\_laundering\\_sting\\_finally\\_ends\\_with\\_one\\_last\\_plea\\_deal.html](http://www.nj.com/news/index.ssf/2014/04/sweeping_nj_corruption_and_money_laundering_sting_finally_ends_with_one_last_plea_deal.html).

3. Hasime Kukaj, *Two Nutley Residents Take Government to Task*, NORTHJERSEY.COM (May 9, 2014, 11:47 AM), <http://www.northjersey.com/news/education/two-residents-take-government-officials-to-task-1.1011504?page=all>.

4. Melvin Mason, *Darien Selectmen OK \$4 million Turf Fields Gift*, DARIENTIMES.COM (May 6, 2014), <http://www.darientimes.com/31239/darien-selectmen-ok-4-million-turf-fields-gift/>.

of his housing proposal to vote on the project.<sup>5</sup> The Rhode Island Ethics Commission fined the Rhode Island Speaker of the House, Gordon Fox, \$1,500 for violating the state's code of ethics when he did not report income for legal work with the Providence Economic Development Partnership.<sup>6</sup> In Massachusetts, a former Planning Board member in Chelmsford was fined \$5,000 for violating the state's conflict of interest laws by representing clients in two lawsuits against the town.<sup>7</sup>

This problem is not confined to the Northeast. A Fredericksburg, Virginia Planning Commissioner submitted his resignation after he was pressured to resign by the city attorney because of conflicts of interest.<sup>8</sup> In North Carolina, the mayor of the state's largest city was indicted on public corruption charges after accepting more than \$48,000 in bribes from FBI agents posing as real estate developers.<sup>9</sup> A Gastonia City councilman reportedly made a controversial vote on a request to rezone after he received a \$250 campaign contribution from the local developer.<sup>10</sup>

In Missouri, a Camden County Associate District Commissioner is currently denying an alleged conflict of interest in an ongoing legal dispute between the county and the developer of an establishment.<sup>11</sup> The mayor of Fort Collins, Colorado is currently contemplating whether or not she should participate in the debate regarding a plan

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5. Katie Mulvaney, *Judge Orders Woonsocket Zoning Board to Reconsider Developer's Housing Proposal*, PROVIDENCE JOURNAL (Nov. 25, 2013, 1:00 AM), <http://www.providencejournal.com/breaking-news/content/20131125-judge-orders-woonsocket-zoning-board-to-reconsider-developers-housing-proposal.ece>.

6. *NEW: Fox Fined \$1500 by Ethics Commission for PEDP Non-Disclosure*, GO-LOCAL PROV NEWS (Jan. 28, 2014), <http://www.golocalprov.com/news/new-fox-fined-1500-by-ethics-commission-for-pedp-non-disclosure/>.

7. Grant Welker, *State Fines Ex-Chelmsford Planning Boardmember McClure \$5G in Ethics Breach*, LOWELLSUN.COM (Aug. 27, 2013, 7:19:56 AM), [http://www.lowellsun.com/news/ci\\_23952577/state-fines-ex-chelmsford-planning-board-member-mcclure](http://www.lowellsun.com/news/ci_23952577/state-fines-ex-chelmsford-planning-board-member-mcclure).

8. *Fredericksburg Planning Commissioner Submits Resignation*, FREDERICKSBURG.COM (Apr. 29, 2014, 1:21 PM), <http://news.fredericksburg.com/citybeat/2014/04/29/fredericksburg-planning-commissioner-submits-resignation/>; *see also* Pamela Gould, *Mayor Urges Planning Commissioner to Resign*, FREDERICKSBURG.COM (Apr. 29, 2014, 1:00 PM), <http://news.fredericksburg.com/newsdesk/2014/04/29/mayor-urges-planning-commissioner-to-resign/>.

9. Mitch Weiss, *Charlotte Mayor Patrick Cannon Indicted on Public Corruption Charges*, HUFFINGTON POST (Mar. 26, 2014, 2:02 PM), [http://www.huffingtonpost.com/2014/03/26/patrick-cannon-indicted\\_n\\_5036527.html](http://www.huffingtonpost.com/2014/03/26/patrick-cannon-indicted_n_5036527.html).

10. Michael Barrett, *City Council Votes on Rezoning Issue Raise Questions About Ethics*, GASTON GAZETTE (May 1, 2014, 4:25 PM), <http://www.gastongazette.com/spotlight/city-council-votes-on-rezoning-issue-raise-questions-about-ethics-1.313593>.

11. Amy Wilson, *PAC Accuses Luber of Conflict of Interest in Ongoing Legal Case*, LAKE NEWS ONLINE (Feb. 24, 2014, 4:30 PM), <http://www.lakenewsonline.com/article/20140227/News/140228776>.

to revitalize a mall because she has a conflict of interest.<sup>12</sup> In Texas, a San Marcos Planning and Zoning vice chair, was charged with a conflict of interest and brought before the Ethics Review Commission.<sup>13</sup> In Kentucky, not only did a Louisville ethics panel refer a conflict to Metro Council due to three ethics complaints regarding votes the Metro Council President made in voting cases involving zoning,<sup>14</sup> but in McCracken County officials were indicted in a zoning case involving unauthorized zone changes in the county that affected at least 500 pieces of property.<sup>15</sup> In Florida, two planning board members in Hollywood quit after a conflict of interest warning from the city attorney.<sup>16</sup>

Sadly, there are countless other media accounts of alleged and proven conflicts of interest and other ethical misconduct. In this annual review of reported decisions involving ethics in land use, recent decisions are discussed in the hopes that municipal attorneys will use this information as the basis of ongoing training for members of planning boards, zoning boards, and local legislative bodies who must be routinely reminded of not only their legal but ethical responsibilities in upholding the public trust.

## II. Conflicts of Interest

### A. *Members of a Church and a Board Member with an Elderly Mother*

In an unreported decision of the New Jersey appellate division, a plaintiff sought to disqualify the mayor and a councilmember from voting on an ordinance involving a redevelopment plan that would include an assisted living facility as a permitted use on a parking lot adjacent to the Unitarian Universalist Congregation Church where both

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12. Kevin Duggan, *Fort Collins Mayor Not Sure About Joining Mall Debate*, COLORADOAN (May 5, 2014, 6:13 PM), available at <http://www.coloradoan.com/story/news/local/2014/05/05/fort-collins-mayor-sure-joining-mall-debate/8744205/>.

13. James Carniero, *Officials Review Alleged Conflict of Interest*, THE UNIVERSITY STAR (Sept. 12, 2013, 12:14 AM), available at <https://star.txstate.edu/node/735>.

14. Marcus Green, *Louisville Ethics Panel Refers Conflict of Interest Opinion to Metro Council*, WDRB.COM (Mar. 20, 2014, 5:19 PM), <http://www.wdrb.com/story/25032672/louisville-ethics-panel-refers-conflict-of-interest-opinion-to-metro-council>.

15. *McCracken County Officials Indicted in Zoning Case*, WHAS11.COM NEWS (Jan. 11, 2014, 5:33 PM), <http://www.whas11.com/news/local/239661171.html>.

16. William Gjebre, *Hollywood Planning Board Members Quit After Conflict of Interest Warning from City Attorney*, BROWARD BULLDOG (Mar. 3, 2014, 6:25 AM), <http://www.browardbulldog.org/2014/03/hollywood-planning-board-members-quit-after-conflict-of-interest-warning-from-city-attorney/>.

individuals were members.<sup>17</sup> Further, the mayor had reportedly commented that, "it would be beneficial for his elderly mother if an assisted living facility were constructed in town."<sup>18</sup> The trial court dismissed the complaint, and on appeal, the plaintiff contended that there was still an issue as to whether the council members' affiliation with the church impaired their objectivity or independence of judgment in passing the ordinance.<sup>19</sup> The New Jersey Municipal Land Use Law states that, "[n]o member of the board of adjustment shall be permitted to act on a matter in which he has, either directly or indirectly, any personal or financial interest."<sup>20</sup> However, not all interests possess the same capacity to tempt a public official, and a remote and speculative interest will not disqualify an official.<sup>21</sup> In fact, the New Jersey Supreme Court has identified four situations where the statutory provision would preclude action by a board member:

- (1) 'Direct pecuniary interests,' when an official votes on a matter benefitting [sic] the official's own property or affording a direct pecuniary gain;
- (2) 'Indirect pecuniary interests,' when an official votes on a matter that financially benefits one closely tied to the official, such as an employer, or family member;
- (3) 'Direct personal interest,' when an official votes on a matter that benefits a blood relative or close friend in a non-financial way, but a matter of great importance, as in the case of a councilman's mother being in the nursing home subject to the zoning issue; and
- (4) 'Indirect Personal Interest,' when an official votes on a matter in which an individual's judgment may be affected because of membership in some organization and a desire to help that organization further its policies.<sup>22</sup>

Here the court found that the council members' mere membership in the church, and the fact that one of them made a comment that his mother could potentially benefit from the development were indirect

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17. *Grabowsky v. Township of Montclair*, 2013 WL 3835357 (NJ Super. Ct. App. Div. 2013).

18. *Id.* at 1. *See generally* *Care of Teneffly, Inc. v Teneffly Bd. of Adjustment*, 704 A.2d 1032 (N.J. Super. Ct. App. Div. 1998), certif. denied, 713 A.2d 500 (N.J. 1998) (discussing common law approach to when a zoning board member's interest disqualifies them from participating in zoning proceedings).

19. *Grabowsky*, 2013 WL 3835357, at \*1 (NJ Super. Ct. App. Div. 2013).

20. N.J. REV. STAT. § 40:55D-69 (2004).

21. *Grabowsky*, 2013 WL 3835357, at \*3 (citing *Haggerty v Red Bank Borough Zoning Bd. of Adjustment*, 897 A.2d 1094, 1100-01 (N.J. Super. Ct. App. Div. 2006)).

22. *Grabowsky*, 2013 WL 3835357, \*3-4 (citing *Wyzykowski v Rizas*, 626 A.2d 406, 414-15 (1993)).

interests and too speculative, and failed to show a disqualifying conflict of interest.<sup>23</sup> The court further pointed out that the Church was not even the applicant, nor a party in the matter, and that the claim that the Church would benefit from “having immobile, elderly neighbors next door,” was too far a stretch.<sup>24</sup> Lastly, the mayor’s statement about his mother failed to show that he had pre-judged the issue.<sup>25</sup>

## B. *Attorney Conflicts of Interest*

### 1. CHANGING CLIENTS

Kane Properties, LLC sought several variances to develop property in Hoboken, New Jersey and Skyline Condominium Association, Inc., represented by Michael Kates, was a major opponent to the project.<sup>26</sup> The Zoning Board of Adjustment held several hearings regarding the application where Kane and Skyline provided evidence both for and against the project and Kates actively participated, opposing the project on behalf of Skyline.<sup>27</sup> After a unanimous vote, the board ultimately approved all of Kane’s applications.<sup>28</sup> Skyline appealed the board’s decision to the city council and shortly thereafter Kates was appointed to serve as the legal advisor to the council and was replaced by W. Mark O’Brien as counsel for Skyline.<sup>29</sup> Kates wrote a letter to both Kane and Skyline, informing them of the procedures of the appeals process and Kane immediately objected to Kates being involved in the appeal, claiming that it was a conflict of interest since Kates had previously served as counsel for Skyline.<sup>30</sup> Edward J. Buzak, of the council responded, advising that Kates had recused himself from the appeal and that he, Buzak, would be taking Kates’ place.<sup>31</sup> Kates’ conflict of interest remained undisputed by the parties and in February of 2010, Kates sent a legal memorandum to the members of the council explaining the procedures to be taken regarding appeals of zoning board decisions, to

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23. See *Grabowsky*, 2013 WL3835357, at \*3-4.

24. *Id.* at \*4.

25. *Id.* at \*4.

26. *Kane Properties, LLC v. City of Hoboken*, 68 A.3d 1274 (N.J. 2013).

27. See *id.* at 1279.

28. *Id.*

29. *Id.*

30. *Kane Properties*, 68 A.3d at 1279-80.

31. *Id.* at 1280.

which Kane again objected.<sup>32</sup> In March of 2010, Buzak appeared at a hearing for the Kane-Skyline appeal and Kates did not appear.<sup>33</sup> After the hearing, the Council reversed the Board's decision, resulting in all but one of Kane's variances being denied.<sup>34</sup> Shortly thereafter, at a council meeting regarding their recent decision, Kates served as counsel for the city instead of Buzak.<sup>35</sup> Kates actively participated in this meeting and even signed and approved the council's resolution.<sup>36</sup> The resolution listed six specific reasons in support of their decision to reverse the board's approval of the variances, concluding that Kane failed to demonstrate that the property was "particularly suitable" for its intended use.<sup>37</sup>

Kane sued the city and its council alleging, among other things, that Kates' involvement in the appeal constituted a conflict of interest that "irreparably tainted and thoroughly undermined the City Council's decision."<sup>38</sup> In support, Plaintiff cited the memorandum sent by Kates regarding the present appeal; Kates' presence and participation in the meeting following the council's decision; and Kates' signing and approval of the resolution.<sup>39</sup> The trial court determined that Kates' conflict of interest did not taint the council's decision, finding that the memorandum was merely a procedural act of his administrative capacity and that his involvement in the resolution was too minimal to have affected the council's decision.<sup>40</sup>

The appellate court reversed, finding that Kates' participation and conflict of interest did taint the council's determination.<sup>41</sup> The court said that the applicable standard should have been whether, "in the mind of a reasonable citizen fairly acquainted with the facts, this scenario would create an appearance of improper influence."<sup>42</sup> Citing to the different ways in which Kates involved himself in the appeal, the court held that such involvement was inappropriate and would

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32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 1281.

38. *Id.* at 1282.

39. *Kane Properties*, 68 A.3d at 1282.

40. *Id.* (The trial court determined that the applicable standard of review was "actual prejudice," not "appearance of impropriety." As such, Plaintiff would need to provide actual evidence of Kates having influenced the council's decision as opposed to a mere appearance of unethical behavior.)

41. *Id.* at 1283.

42. *Id.*

give a “reasonable citizen cause for concern,” and remanded the matter back to the council.<sup>43</sup>

Kane appealed to the supreme court of New Jersey objecting to the remand to the council and defendants cross-appealed, contesting the finding that Kates’ involvement created an appearance of impropriety and tainted the council’s decision.<sup>44</sup> The supreme court first reviewed the issue regarding Kates’ involvement by acknowledging that the conflict of interest is not only undisputed, but it is also clearly satisfied by the definition provided in the Rules of Professional Conduct.<sup>45</sup> The main issue was whether Kates’ involvement, despite his recusal from the matter, was inappropriate under the circumstances.<sup>46</sup> The court said that while the appearance of impropriety standard is correctly inapplicable to an *attorney’s* conflict of interest, a different standard applies to those acting in a *judicial capacity*.<sup>47</sup> According to the Code of Judicial Conduct, judges are to avoid both “impropriety and the appearance of impropriety in all activities.”<sup>48</sup> Since Kates’ role gave him the “opportunity to interpret the law and advise on legal matters,” the supreme court reasoned that Kates’ responsibilities were “quasi-judicial” enough to require the appearance of impropriety standard.<sup>49</sup> When this standard is applied to Kates’ conduct, the court determined that a reasonable, informed member of the public would indeed question the council’s impartiality and the integrity of the proceedings.<sup>50</sup> In remanding the matter to the trial court for a *de novo* review of the board’s decision, the court also directed that the matter be sent to a different judge who would be unquestionably unbiased and impartial.<sup>51</sup>

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43. *Id.* at 1283-84.

44. *Id.* at 1284.

45. *Kane Properties*, 68 A.3d at 1285. According to the Rules of Professional Conduct, a government lawyer cannot participate in a proceeding in which he had previously been involved while in a non-governmental private capacity. *Id.*

46. *Id.*

47. *Id.* at 1286.

48. *Id.*

49. *Id.* at 1286-87 (The court noted that deciding whether there was an appearance of impropriety requires a determination of whether “a reasonable, fully informed person [would] have doubts about the judge’s impartiality[.]” The judge’s conduct should not give the public any “reason to lack confidence in the integrity of the process and its outcome[.]” No evidence of actual bias or impropriety is required under this standard.).

50. *Id.* at 1286. (Kates acknowledged the conflict of interest and recused himself, and he therefore should not have further participated in the appeal. The court explained that a recusal requires a person to completely dissociate himself from the matter, which Kates failed to do.).

51. *Id.* at 1293.

## 2. FORMER CLIENT

Reszka commenced an action seeking removal of Collins, a council member of the town board of the Town of Hamburg alleging that Collins, an attorney, continued a previously filed claim against the town on behalf of a client after taking office.<sup>52</sup> Reszka also alleged that Collins had a complaint of harassment filed against him for filing repeatedly frivolous actions against the town, and posted flyers advertising his legal practice.<sup>53</sup> Collins refuted the allegations by submitting affidavits attesting to the fact that he has not appeared in court since taking an elected position, and Reszka did not provide further evidence to the contrary.<sup>54</sup> The court dismissed the petition, finding that this type of behavior, even if it were true, did not constitute grounds for removing an official from office as the allegations did not demonstrate unscrupulous conduct, a gross dereliction of duty, or a pattern of misconduct and abuse of authority.<sup>55</sup>

### *C. Conflict of Interest Based on Business Investment*

A conflict of interest question arose in a dispute over an ordinance that regulated and restricted non-metered parking in certain districts that were close to the boardwalk and its commercial attractions whereby only those persons who were qualified residents within the district were permitted to park in non-metered spaces from 12:30 a.m. to 4:00 a.m.<sup>56</sup> The primary purpose of the ordinance was to prevent non-residents from entering into the neighborhoods at night while loitering in the streets, wandering drunkenly, and to prevent the degrading of property value.<sup>57</sup> A councilman who was to vote on the newly proposed ordinance was also an owner of a business that owned houses within the district that the ordinance was to be imposed where he had lived for 51 years.<sup>58</sup> Objectors of the ordinance claimed that the councilman had a conflict of interest because of his property within the district and the possibility for him to earn additional fees once the ordinance is passed.<sup>59</sup> The councilman stated that he did not

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52. Reszka v. Collins, 109 A.D.3d 1134 (N.Y. App. Div. 2013).

53. *Id.*

54. *Id.* at 1135.

55. *Id.*

56. Speroni v. Borough of Point Pleasant Beach, 2013 N.J. Nos. OCNL313512, OCN-L-1719-12, 2013 WL 3878558, at \*1 (N.J. Super. Ct. Law Div. June 17, 2013).

57. *Id.*

58. *Id.* at \*4.

59. *Id.* at \*7.



have a conflict of interest and, at the close of the final hearing, the ordinance passed by a vote of 4-3.<sup>60</sup>

In deciding whether the councilman was required to disqualify himself from the voting board, the Superior Court of New Jersey ruled that there is a conflict of interest if an individual has a direct or indirect pecuniary interest, or when there is a direct personal interest, or indirect personal interest.<sup>61</sup> The superior court noted that a local government official should not act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.<sup>62</sup> The court found that the councilman had a conflict of interest because he acknowledged he would receive a direct financial benefit, and that his pecuniary interest derived from his business relationship and ownership in the property, and this interest could reasonably impair his objective judgment.<sup>63</sup>

*D. No Unethical Conflict of Interest by  
Board Member Who Had Previous Business  
Dealing with Applicant*

Saratoga Springs Preservation Foundation (Foundation) is a not-for-profit organization that preserves historic structures in Saratoga Springs.<sup>64</sup> In September 2008, Boff purchased a piece of property, Winans-Crippen House, in a historic area of the city.<sup>65</sup> The house was recognized as a historic structure and listed on the National Register of Historic Places. Boff sought to demolish the house because it was an unsafe structure. The Saratoga Springs Design Review Commission (DRC) deemed itself responsible for overseeing such a request pursuant to the State Environmental Quality Review Act (SEQRA). The DRC found the requested demolition was a “type I” action and issued a positive declaration of environmental significance. It also required Boff to submit a draft environmental impact statement, which

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60. *Id.* at \*13.

61. *Id.* at \*20.

62. *Id.*

63. *Id.*

64. *Saratoga Springs Pres. Found. v. Boff*, 110 AD3d 1326 (N.Y. App. Div. 2013).

65. *Id.*

he complied with in June 2012, and the DRC voted to accept in November 2012.

In December 2012, the Foundation and four individuals commenced an Article 78 proceeding against the city, Boff, and individual members of the DRC challenging the SEQRA determination and seeking an order enjoining the demolition of the house. The DRC voted to approve Boff's demolition application permit, and petitioners brought an additional claim challenging that determination as well. Petitioners argued that one of the four voting members of the DRC had a conflict of interest that should have disqualified him according to the City's Code of Ethics.<sup>66</sup> Specifically, petitioners relied on a portion of the code, which dealt with a city officer having knowledge or having a reason to know that he would receive a personal financial benefit from action taken for a client.<sup>67</sup> The petitioners were referring to a particular DRC member's business relationship with Boff. The member, Richard Martin, had been under contract with Boff on an unrelated construction project two years prior, disclosed this information, and found that recusal was not required.<sup>68</sup> Boff had hired a general contractor and that general contractor hired Martin's construction company for other work.<sup>69</sup> Martin stated that during the time Boff's demolition permit application was pending they were unaware of their business relationship. The court found that because they did not know of their business relationship, nor should they have known, and because the decision on Boff's application occurred two years after their business relationship concluded, Martin was not disqualified for a conflict of interest.

#### *E. Potential Conflicts Must Be Raised Timely*

Richard Dahm submitted an application to the Stark County Board for a zoning amendment to change his property from agricultural to residential to create a 99-lot residential subdivision.<sup>70</sup> After several public hearings, the board denied Dahm's application by a 5-0 vote. On appeal Dahm argued that two of the commissioners had conflicts of interest stemming from their own land development projects, and prejudice against Dahm's competing project.<sup>71</sup> Dahm argued that both of

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66. *Id.* at 840.

67. *Id.*

68. *Id.*

69. *Id.*

70. Dahm v. Stark Cnty. Bd. of Cnty. Comm'rs, 841 N.W.2d 416, 419 (N.D. 2013).

71. *Id.* at 420.

the commissioners separately contracted with developers to turn land in the vicinity of Dahm's project from commercial to residential, however Dahm did not raise this potential conflict of interest to the board and attempted to raise it for the first time in the district court.<sup>72</sup> The court found that the information Dahm sought to introduce was merely speculative, and could not be raised for the first time on appeal.<sup>73</sup>

### III. Recusal and Disqualification

#### *A. Recusal Not Required for Three Board of Supervisors Members Who Disclosed Relationships With Governmental Applicant and its Attorney*

In 2010, Iskalo CBR, LLC ("Iskalo") filed an application for a special exception to build a Washington Metropolitan Area Transit Authority ("WMATA") bus maintenance facility on a parcel of land in Fairfax County.<sup>74</sup> After a public hearing, the planning commission approved the facility as being substantially in accord with the comprehensive plan and thus recommended approval of the application by the board of supervisors. The plan was not well received by the inhabitants of Newberry Station, a residential community situated a mile from the proposed facility and less than a quarter-mile from the road over which the bus traffic would flow. Newberry Station contended throughout the approval process that the facility would significantly increase vehicular traffic over the road, both due to the buses and the cars of employees, throughout the day and night. The Newberry Station Homeowner's Association submitted official comments to the board, recommending they overturn the planning commission's approval.

The board approved the application but not before three of its members made disclosures to the public regarding their personal or professional interest or relationship with the project itself or Iskalo. The board's chairman and a supervisor disclosed that they had received campaign contributions from Iskalo's attorneys and two other members disclosed that they were directors of WMATA. The vote passed 6-3 with the board's chairman abstaining from the vote while the three supervisors who had made disclosures voting to approve the application.

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72. *Id.*

73. *Id.* at 424.

74. *Newberry Station Homeowners Ass'n v. Bd. of Supervisors*, 285 Va. 604 (2013).

The Newberry Station Homeowners Association filed a complaint seeking declaratory judgment that the board's approval of the application was void and injunction barring construction of the facility. They argued that the county code required the interested board members to recuse themselves from consideration of the application. The board argued that the code did not require the supervisors to recuse themselves because they did not have a conflicting business or financial interest covered by the statute. The circuit court sustained the board's argument and Newberry Station appealed.

Newberry Station's main argument was that the interested supervisors were required to recuse themselves from consideration because they each had a conflict of interest. The board's argument in response is the language of the statute, which provides that recusal pertains to instances where there is a "business or financial relationship" and does not require recusal for "business or financial interest." This issue, being statutory in nature, led the court to first analyze whether the plain meaning of the statute could determine whether there is a clear difference between the use of relationship and interest. The court, after determining the language of the statute to be ambiguous looked to the legislative history of the statute and determined that there was no intent by the legislature for the two phrases to have different meanings. However, the court affirmed the circuit court's decision because WMATA is a governmental agency created by a pact between Maryland, Virginia, and Washington D.C. and as such it affords no opportunity for financial benefit to its unpaid directors. Without the financial benefit to its directors, WMATA does not fall under the statute's definition of "corporation". Thus, the court held it was not improper for the supervisors to participate in the consideration process.

Newberry Station also argued that the board approved the application without sufficient evidence. In particular they alleged that the board's actions were arbitrary and capricious because they were undertaken in violation of an existing ordinance. The court rejected this argument, stating that the special exception application was within the authority granted to the board and therefore was not in violation of an ordinance. Newberry Station also argued that the board had failed to properly consider open space, noise, and hazardous materials. The court rejected these contentions because there was ample evidence of consideration of open space and noise, while the statute at issue placed no burden on the board to consider the hazardous materials; instead it places an obligation on the applicant to list toxic substances.

*B. Board Member's Recusal from Voting Because He Was Previously Employed by Applicant Was Sufficient*

Gunnery, a private boarding school in Connecticut, submitted an application to the Wetlands and Watercourse Commission (IWC) for a permit to construct athletic fields; and it was approved subject to conditions.<sup>75</sup> Gunnery then applied to the Washington Zoning Commission (WZC) for a special permit to have construction done on the property, and following several hearings, the WZC ruled that the project was consistent with the Washington Plan of Conservation and Development as it balanced the needs of the school and the town.<sup>76</sup> The board then voted in favor of the application with one of the board members, Reich, recusing himself from voting due to his past experience as a teacher at the school and his involvement with the defendants.<sup>77</sup> Reich, however, did not recuse himself from the case, because, he stated, he had retired from the school six years before he joined the WZC, and he currently had no ties with the school.<sup>78</sup> Plaintiff argued that the WZC demonstrated clear bias, but the defendant responded that the plaintiff failed to establish the Reich was predisposed on the matter.<sup>79</sup> In deciding whether the commissioners had their minds made up prior to the public hearing, the Superior Court of Connecticut held that there is a presumption that administrative board members acting in an adjudicative capacity are not biased.<sup>80</sup> As a result, the court dismissed the appeal, finding Reich was truthful in his statements about working as a teacher in the Gunnery school, and that neither Reich's employment as a teacher nor the decision of the school to honor Reich's deceased son rose to the level of a conflict of interest.<sup>81</sup>

*C. Disqualification Based on Prejudgment*

In a recent Rhode Island case, the plaintiff had submitted variance applications on several occasions and each was denied.<sup>82</sup> It was later discovered that, prior to the last hearing, one of the judges told a board

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75. *Stern v. Town of Wash. Zoning Comm'n*, 2013 WL 5496459 at 1 (Conn. Super. Ct. Sept. 11, 2013).

76. *Id.* at 7-8.

77. *Id.* at 8.

78. *Id.* at 11.

79. *Id.* at 9.

80. *Id.* at 14.

81. *Id.* at 13.

82. *Fernandez v. Bruce*, 2013 R.I. Super. LEXIS 184 (RI Sup. Oct. 21, 2013).

member that he already decided to vote against the application a month before the hearing was conducted.<sup>83</sup> The judge's business associate also spoke out publicly against the application. On appeal from the denial, the superior court vacated the zoning board's decision, and the zoning board then determined that the judge did not have to recuse himself due to his business associate's opposition.<sup>84</sup> The superior court disagreed, ruling that it would be more in keeping with justice and fair play to disqualify a judge who objects to a proposed change even before the hearing, and that the judge should be disqualified because he had already decided how he was voting before the hearing.<sup>85</sup>

#### IV. Bribery

A recent trend in reported cases reveals an alarming increase in federal corruption cases involving land use permits.<sup>86</sup> A number of federal laws are used to ferret out corruption including title 18 U.S.C. § 201(b), which prohibits bribery and the acceptance of certain gratuities.<sup>87</sup> Bribery may manifest itself in cash given in exchange for permits,<sup>88</sup> services in exchange for approvals,<sup>89</sup> and campaign contributions.<sup>90</sup> Other federal statutes that have been used to convict corrupt actors in the land use game include: the Hobbs Act,<sup>91</sup> theft of honest services,<sup>92</sup> and bribery involving federally funded programs.<sup>93</sup>

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83. *Id.* at 18.

84. *Id.* at 1-2

85. *Id.* at 17.

86. See Patricia Salkin & Bailey Ince, *It's a "Criming Shame": Moving from Land Use Ethics to Criminalization of Behavior Leading to Permits and Other Zoning Related Acts*, 46 URB. LAW. 249-67 (2014).

87. 18 U.S.C. § 201(b) (2012). For an explanation, see *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404-05 (1999).

88. See, e.g., *United States v. Curescu*, 2011 WL 2600572 (N.D. Ill. June 29, 2011).

89. See, e.g., *United States v. Boender*, 649 F.3d 650 (7th Cir. 2011).

90. See, e.g., *United States v. Beldini*, 443 Fed. App'x 709, 710 (3d Cir. 2011); *United States v. Boone*, 628 F.3d 927 (7th Cir. 2010).

91. 18 USC § 1951 (2012). A public official is guilty of extortion under color of official right when he or she induces someone to relinquish their property in order to perform some act the official was already under a duty to perform. See *Evans v. United States*, 504 U.S. 225, 273 (1992).

92. 18 U.S.C. § 1346 (2012).

93. 18 U.S.C. § 666 (2012).

*A. Promise of Donation to Charity and Threat of Lawsuit If Opposition to Rezoning*

Issa, a developer seeking rezoning to develop an IHOP restaurant told city council member Benson that he would make a donation to charity upon the closing of the IHOP property, but Benson was not amenable to the request.<sup>94</sup> Issa then told Benson he would sue the council if Benson were going to garner opposition to the rezoning.<sup>95</sup> Benson informed the council of Issa's attempt to bribe him prior to the council voting on the property, and the council denied the rezoning.<sup>96</sup> Issa then sued the councilman for allegedly defaming him on two separate occasions when the councilman accused Issa of offering a bribe to influence Benson's vote on the rezoning issue.<sup>97</sup> The Tennessee Court of Appeals agreed with Councilman Benson that his statements were protected under both legislative and litigation privilege.

*B. Another Distressing Corruption Scheme*

Federal law prohibits local and state government agents from "corruptly solicit[ing] or demand[ing] for the benefit of any person, or accept[ing] or agree[ing] to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such . . . government . . . involving any thing of value of \$5,000 or more."<sup>98</sup>

Fourteen defendants were indicted by a federal grand jury in September 2007 on various counts, including bribery, extortion, money laundering, and fraud. Of these fourteen defendants, Darren Reagan, D'Angelo Lee, Donald Hill, and Sheila Farrington appealed.<sup>99</sup> Hill was an elected member of the City Council of Dallas, Texas, and Lee was appointed by Hill to the City Plan and Zoning Commission ("CPC").<sup>100</sup> Farrington was Hill's mistress and future wife, who acted as a consultant under the business name Farrington & Associates.<sup>101</sup> Reagan was the chairman and chief executive of the Black State Employees Association of Texas and the BSEAT Community Development Corporation, and Brian Potashnik and James Fisher were two housing developers who were involved in illegal activity

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94. Issa v. Benson, 420 S.W.3d 23 (Tenn. Ct. App. 2013).

95. *Id.*

96. *Id.*

97. *Id.*

98. United States v. Reagan, 725 F.3d 471, 481 (2013).

99. *Id.* at 477.

100. *Id.*

101. *Id.*

with appellants in attempts to obtain “public financing, zoning clearance, and political support for their rival housing development plans in Dallas.”<sup>102</sup>

In order to gain political support from Hill for his housing developments, Potashnik hired Farrington as a “community consultant.”<sup>103</sup> Potashnik paid Farrington regularly, even though Farrington never did any work for him and instead used the money to buy cars for Hill and Lee.<sup>104</sup> Hill promised Potashnik that, in return, Hill would push the council to finance one of Potashnik’s developments.<sup>105</sup> Lee then requested that Potashnik hire a woman named Andrea Spencer as a minority contractor, who did no work herself but partnered with a white male contractor named Ron Slovacek.<sup>106</sup> After Spencer and Slovacek were given a concrete contract, Hill pushed the council to fund two of Potashnik’s developments and obtain permits for a different development.<sup>107</sup> As it later turned out, Lee had been taking 10% of Slovacek’s checks.<sup>108</sup> In exchange for Potashnik’s working out another deal with Spencer and Slovacek, Lee and Hill offered to push a proposal to the council that would reduce certain zoning requirements in one of Potashnik’s developments, and when the proposal did not pass, Potashnik refused to enter into a contract with Spencer and Slovacek.<sup>109</sup>

Appellants were also involved in similar illegal schemes with Fisher, Potashnik’s rival.<sup>110</sup> In August of 2004, Reagan asked Fisher for portions of his developer’s fee, and in exchange, “Reagan would ensure that Fisher would not have problems with Hill and the City Council.”<sup>111</sup> Later that October, several zoning rulings were made that negatively affected Fisher’s developments and days later when Fisher refused to contribute money to fund Hill’s birthday party, a CPC vote that would affect Fisher was postponed.<sup>112</sup> Fisher signed a contract with Reagan in November of 2004, which resulted in the council’s approval to finance one of Fisher’s developments, Pecan

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102. *Id.*

103. *United States v. Reagan*, 725 F.3d at 478.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 478-79.

110. *Id.* at 479.

111. *United States v. Reagan*, 725 F.3d at 479.

112. *Id.*



Grove.<sup>113</sup> Thereafter, two inexperienced contractors, Rickey Robertson and Jibreel Rashad, told Fisher that if they were to serve as subcontractors on the Pecan Grove project, Lee would get the CPC to approve another one of Fisher's projects.<sup>114</sup> Fisher refused to deal with Robertson and Rashad after learning that they (1) expected Fisher to cut them in on 10% of the projects' value and (2) planned to subcontract out all the work given to them. Reagan sent invoices to Fisher requesting payment for various alleged services.<sup>115</sup> When Fisher refused to pay, Hill delayed another council vote on one of Fisher's projects.<sup>116</sup> In February 2005, Reagan demanded more fees from Fisher and named subcontractors that he wanted Fisher to use and, although Fisher refused these requests, he did pay Reagan a portion of the requested amount.<sup>117</sup> The FBI photographed Reagan handing an envelope with \$10,000 to Hill, who gave \$5,000 to Farrington, who gave \$2,500 to Lee.<sup>118</sup> Hill further delayed the votes on one of Fisher's developments and Reagan demanded more money from Fisher.<sup>119</sup> The FBI took photographs of Reagan giving \$7,000 to Lee, \$2,500 of which was deposited into Hill's campaign account the following day.<sup>120</sup>

Fisher was then told that if he worked together with Kevin Dean, owner of an asphalt company, and John Lewis, an attorney, Hill would approve one of Fisher's development projects.<sup>121</sup> After Fisher signed a contract with Lewis and made an initial payment of \$50,000, Hill was successful in getting zoning approval for Fisher's development.<sup>122</sup>

After reviewing the foregoing evidence at trial, the jury found Hill, Lee, and Farrington guilty on several counts of fraud, bribery, and conspiracy to launder money.<sup>123</sup> All four appellants were also found guilty for extortion.<sup>124</sup> The substantive issues on appeal dealt with evidentiary sufficiency,<sup>125</sup> and for purposes of this review are not relevant.

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113. *Id.* at 479.

114. *Id.*

115. *Id.* at 480.

116. *Id.* at 479-80.

117. *Id.* at 480.

118. *Id.*

119. *United States v. Reagan*, 725 F.3d at 480.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* 480-81.

124. *Id.*

125. *Id.* at 481.

*C. Revocation of Host Community Agreement  
Following Bribery Upheld*

In an earlier proceeding, plaintiff was found to have engaged in a criminal conspiracy to bribe a city council member, and it was determined that the bribe resulted in the council member's changing of votes towards the plaintiff's zoning plan.<sup>126</sup> As a result, the plaintiff's conditional use grant for the host community agreement was revoked. The plaintiff appealed claiming that he still had an interest in the land, therefore, the city must return payments that were made under the host community agreement.<sup>127</sup> In denying the plaintiff's motion, the court found it was a matter of fact that there were apparent acts of bribery involved in procuring the host community agreement.<sup>128</sup> The city's ultimate denial of the host community agreement did not unjustly enrich the city, because the host community agreement would have expired on its own terms and the plaintiff made no efforts to rescind the agreement.<sup>129</sup>

*D. Miscellaneous*

1. AICP CODE OF ETHICS DOES NOT ESTABLISH A  
LEGAL DUTY OF ENFORCEABLE STANDARD OF CARE

In a recent Colorado case, plaintiff hired the defendant for land planning and development services to provide a development analysis for properties owned by the plaintiff.<sup>130</sup> The defendant then filed a claim against the plaintiff, stating that the plaintiff gave inaccurate advice about how the properties would be developed, and the plaintiff also filed a claim against the defendant for breach of contract.<sup>131</sup> The Colorado Court of Appeals ruled that an expert's opinion as to the best practices and ethics of a type of service does not necessarily establish a legally enforceable duty of care independent of the applicable agreement, and that the American Institute of Certified Planners code does not establish a legal duty or an enforceable standard of care independent of those in the agreement.<sup>132</sup>

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126. *Systematic Recycling, LLC v. City of Detroit*, No. 09-11430, 2013 WL 425431 (E.D. Mich. Jan. 24, 2013).

127. *Id.*

128. *Id.*

129. *Id.* at \*12-13.

130. *Stan Clauson Assocs., Inc. v. Coleman Bros. Constr., LLC*, 297 P.3d 1042, 1044 (Colo. Ct. App. 2013).

131. *Id.* at 1044.

132. *Id.* at 1047-48.

2. EX PARTE COMMUNICATION WAS INAPPROPRIATE  
BUT DID NOT TAINT BOARD'S DECISION

Berwick Iron operated a metal and automobile recycling business in a rural commercial and industrial district under a conditional use permit for automobile recycling.<sup>133</sup> In 2010, Berwick Iron applied for and received another conditional use permit to install and operate a metal shredder.<sup>134</sup> Abutters challenged the board's decision.<sup>135</sup>

The board hired an environmental consulting firm to conduct an independent review of the potential air emissions and sound levels from the facility but because Berwick Iron was required to pay for the environmental firm, the board obtained three estimates from engineering firms to compare prices and the town planning coordinator then contacted the attorney representing Berwick Iron and attached the proposals.<sup>136</sup> The attorney for Berwick Iron responded to the email and stated that the firm with the lowest estimate could proceed with the review.<sup>137</sup> Neither the planning coordinator nor the board informed the public or the attorney for the nine abutting landowners of the email exchange.<sup>138</sup>

After receiving the results of the independent review, the board again voted to approve the conditional use permit for the shredder.<sup>139</sup> The abutters again sought review, and the court vacated the board's decision again on the basis that it violated the abutters' due process rights when it failed to notify the public or the abutters' counsel of the email exchange discussing the choices for an independent reviewer.<sup>140</sup> The board asked the superior court to clarify its decision, and the court stated that although the board did violate due process, it did not influence the outcome of the case, but the board's lack of compliance with its own emissions statute was the reason.<sup>141</sup>

On appeal, the abutters argued that the planning board violated their due process rights when the planning coordinator sent an email only to Berwick Iron.<sup>142</sup> The court stated that, in the context of municipal planning boards, due process means the party is entitled to a fair

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133. *Duffy v. Town of Berwick*, 82 A.3d 148, 151-52 (Me. 2013).

134. *Id.* at 151-52.

135. *Id.* at 153.

136. *Id.*

137. *Id.*

138. *Id.* at 153.

139. *Id.*

140. *Id.*

141. *Id.* at 154.

142. *Id.*

and unbiased hearing.<sup>143</sup> The supreme court agreed with the superior court that the email did not taint the board's decision because the board had essentially made its decisions and was merely seeking Berwick Iron's approval because it was required to pay for the expert, therefore, the gravity of the ex parte communication was limited.<sup>144</sup> The court also noted that the abutters had the opportunity to respond to the choice of independent reviewer during the public hearing. The court concluded that the ex parte communication was not enough to require the court to vacate the board's decision.<sup>145</sup>

## **V. Conclusion**

The Land Use Ethics Committee of the ABA Section on State and Local Government Law continues to review and discuss new cases in this area on an annual basis. Attorneys representing governments and applicants before governments are welcome and encouraged to participate in this effort to ensure that the land use process proceeds in a transparent, fair, and ethical manner.

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143. *Id.* at 155.

144. *Id.* at 155-56.

145. *Id.* at 156.



SOCIAL MEDIA ETHICS GUIDELINES

OF THE

COMMERCIAL AND FEDERAL LITIGATION SECTION

OF THE

NEW YORK STATE BAR ASSOCIATION

MARCH 18, 2014

Gregory K. Arenson, Section Chair  
Mark A. Berman, Co-Chair of the Social Media Committee  
Ignatius A. Grande, Co-Chair of the Social Media Committee

*Opinions expressed are those of the Section preparing this report and do not represent those of the New York State Bar Association unless and until the report has been adopted by the Association's House of Delegates or Executive Committee.*

PREPARED BY

THE SOCIAL MEDIA COMMITTEE OF  
THE COMMERCIAL AND FEDERAL LITIGATION SECTION

*CO-CHAIRS*

Mark A. Berman  
Ganfer & Shore LLP

Ignatius A. Grande  
Hughes Hubbard & Reed LLP

*SECRETARY*

Aaron E. Zerykier  
Farrell Fritz, PC

*MEMBERS*

Monique Altheim  
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Maryanne Stanganelli  
Dan Toshiki Szajngarten  
Deirdre E. Tracey

## TABLE OF CONTENTS

	<b>Page</b>
Members of the Social Media Committee .....	i
Table of Contents .....	ii
Introduction.....	1
Guideline No. 1 Attorney Advertising.....	3
Guideline No. 2 Furnishing of Legal Advice Through Social Media.....	6
Guideline No. 3 Review and Use of Evidence from Social Media .....	8
Guideline No. 4 Ethically Communicating with Clients .....	11
Guideline No. 5 Researching Social Media Profiles or Posts of Prospective and Sitting Jurors and Reporting Juror Misconduct.....	15
Appendix -- Definitions .....	18

## **INTRODUCTION**

Social media networks such as LinkedIn, Twitter and Facebook are becoming indispensable tools used by legal professionals and those with whom they communicate. Particularly, in conjunction with the expansion of mobile technologies in the legal profession, social media platforms have transformed the ways in which lawyers communicate. As use of social media by lawyers and clients continues to grow and as social media networks proliferate and become more technologically advanced, so too do the ethical issues facing lawyers. Accordingly, the Commercial and Federal Litigation Section of the New York State Bar Association developed these social media ethics guidelines (the “Guidelines”) to assist lawyers in understanding the ethical challenges of social media.

These Guidelines are merely that, and are not “best practices.” The world of social media is a nascent area that is rapidly changing and “best practices” will continue to evolve to keep pace with such developments. Moreover, there may be no single set of “best practices” where there are multiple ethics codes throughout the United States that govern lawyers’ conduct. In fact, even where jurisdictions have identical ethics rules, ethics opinions addressing a lawyer’s permitted use of social media may differ due to varying jurisdictions’ different social mores, population bases and historical approaches to their own ethics rules and opinions. We specifically note this because New York State ethics rules and opinions sometimes take different approaches from other jurisdictions with the same or similar ethics rules.

These Guidelines are predicated upon the New York Rules of Professional Conduct (“NYRPC”)<sup>1</sup> and ethics opinions interpreting them. However, illustrative ethics opinions from other jurisdictions may be referenced where, for instance, a New York ethics opinion has not addressed a certain situation or where another jurisdiction’s ethics opinion differs from New York’s interpretation of the NYRPC. In New York State, ethics opinions are issued not just by the New York State Bar Association, but by local bar associations located throughout New York.<sup>2</sup>

Lawyers need to appreciate that social media communications that reach across multiple jurisdictions may implicate other states’ ethics rules. Lawyers should ensure compliance with the ethical requirements of each jurisdiction in which they practice, which may vary considerably.

Lawyers must be conversant with the nuances of each social media network the lawyer or his or her client may use. This is a serious challenge that lawyers must appreciate and cannot take lightly.

[Lawyers must] understand the functionality of any social media service she intends to use for . . . research. If an attorney cannot ascertain the functionality of a website, the attorney must proceed with great caution in conducting research on that

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<sup>1</sup> <https://www.nycourts.gov/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdf>

<sup>2</sup> A breach of an ethics rule is not enforced by bar associations, but by the appropriate disciplinary bodies. Ethics opinions are not binding in disciplinary proceedings, but may be used as a defense in certain circumstances.



particular site.<sup>3</sup>

Indeed, the comment to Rule 1.1 to the Model Rules of Professional Conduct of the American Bar Association was recently amended to provide:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.<sup>4</sup>

Lawyers appreciate that one of the best ways to investigate and obtain information about a party, witness, or juror, without having to engage in formal discovery, is to review that person's social media account, profile, or posts. Lawyers must remember, however, that ethics rules and opinions govern whether and how a lawyer may view such social media communications. Unintended social media communications have ethical consequences when conducting research. For example, by viewing someone's social media profile on a network, such as LinkedIn, a lawyer may cause the holder of the account to be automatically notified by such network of the attempted or actual viewing of the profile.

Further, because social media communications are often not just directed at a single person but at a group of people, attorney advertising rules and other related issues raise ethical concerns. It is not always readily apparent that a lawyer's social media communications may constitute prohibited "attorney advertising." Similarly, privileged information may be unintentionally divulged beyond the intended recipient when a lawyer communicates to a group using social media. Lawyers must be cognizant when a social media communication might create an unintended attorney-client relationship. There are also ethical obligations with regard to a lawyer counseling clients about their social media posts and the removal or deletion of them, which may be subject to litigation or regulatory preservation obligations.

Throughout these Guidelines, the terms "website," "account," "profile," and "post" are referenced in order to highlight sources of electronic data which might be viewed by a lawyer, and the definition of these terms no doubt will change and new ones will be created as technology advances. However, such terms for purposes of complying with these Guidelines are functionally interchangeable and a reference to one should be viewed as a reference to each for ethical considerations.

References to the applicable provisions of the NYRPC and references to relevant ethics opinions are noted after each guideline. Finally, definitions of certain terminology used in the Guidelines are set forth in the Appendix.

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<sup>3</sup> [Ass'n of the Bar of the City of New York Comm. on Prof'l and Jud. Ethics \("NYCBA"\), Formal Op. 2012-2 \(2012\).](#)

<sup>4</sup> [American Bar Ass'n Model Rules of Prof. Conduct, Rule 1.1, Comment 8.](#)

## **1. ATTORNEY ADVERTISING**

### **Guideline No. 1.A Applicability of Advertising Rules**

**A lawyer's social media profile that is used only for personal purposes (*i.e.*, to maintain contact with friends and family) is not subject to attorney advertising and solicitation rules. However, a social media profile that a lawyer primarily uses for the purpose of her and her law firm's business is subject to such rules.<sup>5</sup>**

NYRPC 1.0, 7.1, 7.3.

*Comment:* Whether a social media account is primarily used for legal or marketing purposes of the lawyer or her law firm is a question of fact. In the case of a lawyer's profile on a hybrid account that, for instance, is used for multiple purposes, it would be prudent for the lawyer to assume that the attorney advertising and solicitation rules apply.

A lawyer's post, including a "Tweet," that is used to promote the lawyer's legal services or the services of the law firm for which the lawyer works is subject to the ethical rules where the post's primary purpose is to bring in or retain legal business. In order to satisfy Twitter's 140-character limitation, lawyers may utilize commonly recognized abbreviations for information that is required in attorney advertisements.

### **Guideline No. 1.B: Prohibited Use of "Specialists" on Social Media**

**Lawyers and law firms shall not advertise areas of practice under headings in social media platforms that include the terms "specialist," unless the lawyer is certified by the appropriate accrediting body in the particular area.<sup>6</sup>**

NYRPC 7.4.

*Comment:* To avoid making prohibited statements about a lawyer's qualifications under a specific heading or otherwise, a lawyer should use objective information and language to convey information about the lawyer's experience. Examples of such

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<sup>5</sup> See also [Virginia State Bar, Quick Facts about Legal Ethics and Social Networking](#) (last updated Feb. 22, 2011); [Cal. State Bar Standing Comm. on Prof'l Resp. and Conduct, Formal Op. No. 2012-186](#) (2012).

<sup>6</sup> See [New York State Bar Ass'n Comm. on Prof'l Ethics \("NYSBA"\), Op. 972](#) (2013). See also [Florida Bar Advisory Advertising Op.](#) (Sept. 11, 2013). But see [N.H. Bar Ass'n, Ethics Corner](#) (June 21, 2013) ("[Y]ou may list your areas of practice under Skills and Expertise, so long as you are careful not to identify yourself as a specialist. Also, be mindful that LinkedIn sometimes changes its headings. The profile section now identified as 'Skills and Expertise' used to be 'Specialties,' and listing your areas of practice as 'Specialties' could be problematic.").

information include the number of years in practice and the number of cases handled in a particular field or area.<sup>7</sup>

If the social media network, such as LinkedIn, does not permit otherwise ethically prohibited “pre-defined” headings, such as “specialist,” to be modified, the lawyer shall not identify herself under such heading unless appropriately certified. New York has not addressed whether a lawyer or law firm could, consistent with NYRPC Rule 7.4(a), “list practice areas under other headings such as “Products & Services” or “Skills and Expertise.”<sup>8</sup> However, a lawyer may include information about the lawyer’s experience elsewhere, such as under another heading or in an untitled field that permits biographical information to be included. Certain states have issued ethics opinions prohibiting lawyers from listing their practice areas not only under “specialist,” but also under headings including expert.<sup>9</sup>

A limited exception to identification as a specialist may exist for individual lawyers who are certified “by a private organization approved for that purpose by the American Bar Association” or by an “authority having jurisdiction over specialization under the laws of another state or territory.” For example, identification of such traditional titles as “Patent Attorney” or “Proctor in Admiralty” are permitted for lawyers entitled to use them.

#### **Guideline No. 1.C: Lawyer Solicitation to View Social Media and a Lawyer’s Responsibility to Monitor Social Media Content**

**When inviting others to view a lawyer’s social media network, account, or profile, a lawyer must be mindful of the traditional ethical restrictions relating to solicitation and the recommendations of lawyers.<sup>10</sup>**

**A lawyer is responsible for all content that the lawyer posts on her social media website or profile. A lawyer is not responsible for information that another person, who is not an agent of the lawyer, posts on a lawyer’s website, unless the lawyer prompts such person to post the information or otherwise uses such person to circumvent the ethics rules concerning advertising.**

**A lawyer has a duty to monitor her social media profile, as well as blogs, for comments and recommendations to ensure compliance with ethics rules. If a person who is not an agent**

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<sup>7</sup> See also [Phila. Bar Ass’n Prof’l Guidance Comm., Op. 2012-8](#) (2012) (citing Pa. Bar Ass’n Comm. on Legal Ethics and Prof’l Responsibility, Formal Op. 85-170 (1985)).

<sup>8</sup> [NYSBA Op. 972 \(2013\)](#).

<sup>9</sup> [Fl. Bar Advisory Advertising Op. \(Sept. 11, 2013\)](#) (staff opinion prohibiting attorneys from listing practice areas under the “Skills & Expertise” heading in LinkedIn).

<sup>10</sup> See also [Fl. Bar Standing Comm. on Advertising, Guidelines for Networking Sites](#) (revised Apr. 16, 2013).

**of the lawyer unilaterally posts content to the lawyer’s social media website or profile that does not comply with ethics rules, the lawyer must remove such content if such removal is within the lawyer’s control and, if not within the lawyer’s control, she must ask that person to remove it.<sup>11</sup>**

NYRPC 7.1, 7.2, 7.3, 7.4.

*Comment:* While a lawyer is not responsible for a post made by a person who is not an agent of the lawyer, a lawyer’s obligation not to disseminate, use or participate in the dissemination or use of advertisements containing misleading, false or deceptive statements includes a duty to remove information from the lawyer’s social media profile where that information does not comply with applicable ethics rules. If a post cannot be removed, consideration must be given as to whether a curative post needs to be made. Although social media communications tend to be far less formal than typical communications to which ethics rules have historically applied, they apply with the same force and effect to social media postings.

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<sup>11</sup> See also [id.](#); [Phila. Bar Assn. Prof’l Guidance Comm., Op. 2012-8 \(2012\)](#); [Virginia State Bar, Quick Facts about Legal Ethics and Social Networking \(last updated Feb. 22, 2011\)](#).

## **2. FURNISHING OF LEGAL ADVICE THROUGH SOCIAL MEDIA**

### **Guideline No. 2.A: Provision of General Information**

**A lawyer may provide general answers to legal questions asked on social media. A lawyer, however, cannot provide specific legal advice on a social media network because a lawyer's responsive communications may be found to have created an attorney-client relationship and legal advice also may impermissibly disclose information protected by the attorney-client privilege.**

NYRPC 1.0, 1.4, 1.6, 7.1, 7.3.

*Comment:* An attorney-client relationship must knowingly be entered into by a client and lawyer, and informal communications over social media could unintentionally result in a client believing that such a relationship exists. If an attorney-client relationship exists, then ethics rules concerning, among other things, the disclosure over social media of information protected by the attorney-client privilege to individuals other than to the client would apply.

### **Guideline No. 2.B: Public Solicitation is Prohibited Through "Live" Communications**

**Due to the "live" nature of real-time or interactive computer-accessed communications,<sup>12</sup> which includes, among other things, instant messaging and communications transmitted through a chat room, a lawyer may not "solicit"<sup>13</sup> business from the public through such means.<sup>14</sup> If a potential client initiates a specific request seeking to**

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<sup>12</sup> "Computer-accessed communication" is defined by NYRPC 1.0(c) as "any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto." The official comments to NYRPC 7.3 advise: "Ordinary email and web sites are not considered to be real-time or interactive communication. Similarly, automated pop-up advertisements on a website that are not a live response are not considered to be real-time or interactive communication. Instant messaging, chat rooms, and other similar types of conversational computer-accessed communication are considered to be real-time or interactive communication."

<sup>13</sup> "Solicitation" means "any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client." NYRPC 7.3(b).

<sup>14</sup> See [NYSBA Op. 899 \(2011\)](#). Ethics opinions in a number of states have addressed chat room communications. See also [Ill. State Bar Ass'n, Op. 96-10 \(1997\)](#); [Michigan Standing Comm. on Prof'l and Jud. Ethics, Op. RI-276 \(1996\)](#); [Utah State Bar Ethics Advisory Opinion Comm., Op. 96-10 \(1997\)](#); [Va. Bar Ass'n Standing Comm. on Advertising, Op. A-0110 \(1998\)](#); [W. Va. Lawyer Disciplinary Bd., Legal Ethics Inquiry 98-03 \(1998\)](#).

The Philadelphia Bar Ass'n, however, has opined that, under the Pennsylvania Rules of Professional Conduct, which are different from the NYRPC, solicitation through a chat room is permissible, because it is more akin to targeted direct mail advertisements, which are allowed under Pennsylvania's ethics rules. See [Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2010-6 \(2010\)](#).

**retain a lawyer during real-time social media communications, a lawyer may respond to such request. However, such response must be sent through non-public means and must be kept confidential, whether the communication is electronic or in some other format. Emails and solicitation on a website are not considered real-time or interactive communications. This guideline does not apply if the recipient is a close friend, relative, former client, or existing client: although ethics rules would otherwise apply to such communications.**

NYRPC 1.0, 1.4, 1.6, 1.7, 1.8, 7.1, 7.3.

*Comment:* Answering general questions on the Internet is analogous to writing for any publication on a legal topic.<sup>15</sup> “Standing alone, a legal question posted by a member of the public on real-time interactive Internet or social media sites cannot be construed as a ‘specific request’ to retain the lawyer.”<sup>16</sup> In responding to questions, a lawyer may not provide answers that appear applicable to all apparently similar individual problems because variations in underlying facts might result in a different answer.<sup>17</sup> A lawyer should be careful in responding to an individual question on social media as it might establish an attorney-client relationship, probably one created without a conflict check, and, if the response over social media is viewed by others beyond the intended recipient, it may disclose privileged or confidential information.<sup>18</sup>

A lawyer is permitted to accept employment that results from participating in “activities designed to educate the public to recognize legal problems.”<sup>19</sup> As such, if a potential client initiates a specific request to retain the lawyer resulting from real-time Internet communication, the lawyer may respond to such request as noted above.<sup>20</sup> However, such communications should be sent solely to that potential client. If, however, the requester does not provide his or her personal contact information when seeking to retain the lawyer or law firm, consideration should be given by the lawyer to respond in two steps: first, ask the requester to contact the lawyer directly not through a real-time communication, but instead by email, telephone, etc., and second, the lawyer’s actual response should not be made through a real time communication.<sup>21</sup>

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<sup>15</sup> See [NYSBA Op. 899 \(2011\)](#).

<sup>16</sup> See *id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> See *id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

### **3. REVIEW AND USE OF EVIDENCE FROM SOCIAL MEDIA**

#### **Guideline No. 3.A: Viewing a Public Portion of a Social Media Website**

**A lawyer may view the public portion of a person’s social media profile or public posts even if such person is represented by another lawyer. However, the lawyer must be aware that certain social media networks may send an automatic message to the person whose account is being viewed which identifies the person viewing the account as well as other information about such person.**

NYRPC 4.1, 4.2, 4.3, 5.3, 8.4.

*Comment:* A lawyer is ethically permitted to view the public portion of a person’s social media website, profile or posts, whether represented or not, for the purpose of obtaining information about the person, including impeachment material for use in litigation.<sup>22</sup> Public means information available to anyone viewing a social media network without the need for permission from the person whose account is being viewed. Public information includes content available to all members of a social media network and content that is accessible without authorization to non-members.

However, unintentional communications with a represented party may occur if a social media network automatically notifies that person when someone views her account. The social media network may also allow the person whose account was viewed to see the entire profile of the viewing lawyer or her agent. Such automatic messages, as noted below, have been specifically found to lead to an ethical violation when seeking to investigate or monitor jurors.

#### **Guideline No. 3.B: Contacting an Unrepresented Party to View a Restricted Portion of a Social Media Website**

**A lawyer may request permission to view the restricted portion of an unrepresented person’s social media website or profile. However, the lawyer must use her full name and an accurate profile, and she may not create a different or false profile in order to mask her identity. If the person asks for additional information from the lawyer in response to the request that seeks permission to view her social media profile, the lawyer must accurately provide the information requested by the person or withdraw her request.**

NYRPC 4.1, 4.3, 8.4.

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<sup>22</sup> See [NYSBA Op. 843 \(2010\)](#).



*Comment:* It is permissible for a lawyer to join a social media network to obtain information concerning a witness.<sup>23</sup> The New York City Bar Association has opined, however, that a lawyer shall not “friend” an unrepresented individual using “deception.”<sup>24</sup>

In New York, there is no “deception” when a lawyer utilizes her “real name and profile” to send a “friend” request to obtain information from an unrepresented person’s social media account.<sup>25</sup> In New York, the lawyer is not required to disclose the reasons for making the “friend” request.<sup>26</sup>

New Hampshire, however, requires that a request to a “friend” must “inform the witness of the lawyer’s involvement in the disputed or litigated matter,” the disclosure of the “lawyer by name as a lawyer” and the identification of “the client and the matter in litigation.”<sup>27</sup> San Diego requires disclosure of the lawyer’s “affiliation and the purpose for the request.”<sup>28</sup> Philadelphia notes that the failure to disclose that the “intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness” constitutes an impermissible omission of a “highly material fact.”<sup>29</sup>

In Oregon, there is an opinion that, if the person being sought out on social media “asks for additional information to identify [the l]awyer, or if [the l]awyer has some other reason to believe that the person misunderstands her role, [the l]awyer must provide the additional information or withdraw the request.”<sup>30</sup>

### **Guideline No. 3.C: Viewing A Represented Party’s Restricted Social Media Website**

**A lawyer shall not contact a represented person to seek to review the restricted portion of the person’s social media profile unless an express authorization has been furnished by such person.**

NYRPC 4.1, 4.2.

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<sup>23</sup> See also [N.H. Bar Ass’n Ethics Advisory Comm., Op. 2012-13/05 \(2012\)](#).

<sup>24</sup> [NYCBA Formal Op. 2010-2 \(2010\)](#).

<sup>25</sup> [Id.](#)

<sup>26</sup> [See id.](#)

<sup>27</sup> [N.H Bar Ass’n Ethics Advisory Comm., Op. 2012-13/05 \(2012\)](#).

<sup>28</sup> [San Diego County Bar Ass’n Legal Ethics Comm., Op. 2011-2 \(2011\)](#).

<sup>29</sup> [Phila. Bar Ass’n Prof’l Guidance Comm., Op. Bar 2009-2 \(2009\)](#).

<sup>30</sup> [Oregon State Bar Comm. on Legal Ethics, Formal Op. 2013-189 \(2013\)](#).



*Comment:* Whether a person is represented by a lawyer, individually or through corporate counsel, is sometimes not clear under the facts and applicable case law.

The Oregon State Bar Committee has noted that “[a]bsent actual knowledge that the person is represented by counsel, a direct request for access to the person’s non-public personal information is permissible.”<sup>31</sup>

Caution should be used by a lawyer before deciding to view a potentially private or restricted social media account or profile of a represented person which the lawyer rightfully has a right to view, such as a professional group where both the lawyer and represented person are members or as a result of being a “friend” of a “friend” of such represented person.

**Guideline No. 3.D: Lawyer’s Use of Agents to Contact a Represented Party**

**As it relates to viewing a person’s social media account, a lawyer shall not order or direct an agent to engage in specific conduct, or with knowledge of the specific conduct by such person, ratify it, where such conduct if engaged in by the lawyer would violate any ethics rules.**

NYRPC 5.3, 8.4.

*Comment:* This would include, *inter alia*, a lawyer’s investigator, legal assistant, secretary, or agent<sup>32</sup> and could, as well, apply to the lawyer’s client.<sup>33</sup>

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<sup>31</sup> Id. See [San Diego County Bar Ass’n Legal Ethics Comm., Op. 2011-2 \(2011\)](#).

<sup>32</sup> See [NYCBA Formal Op. 2010-2 \(2010\)](#).

<sup>33</sup> See also [N.H Bar Ass’n Ethics Advisory Comm., Op. 2012-13/05 \(2012\)](#).

#### 4. ETHICALLY COMMUNICATING WITH CLIENTS

##### Guideline No. 4.A: Removing Existing Social Media Information

A lawyer may advise a client as to what content may be maintained or made private on her social media account, as well as to what content may be “taken down” or removed, whether posted by the client or someone else, as long as there is no violation of common law or any statute, rule, or regulation relating to the preservation of information.<sup>34</sup> Unless an appropriate record of the social media information or data is preserved, a party or nonparty may not delete information from a social media profile that is subject to a duty to preserve.

NYRPC 3.1, 3.3, 3.4, 4.1, 4.2, 8.4.

*Comment:* A lawyer must ensure that potentially relevant information is not destroyed “once a party reasonably anticipates litigation”<sup>35</sup> or in accordance with common law, statute, rule, or regulation. Failure to do so may result in sanctions. “[W]here litigation is anticipated, a duty to preserve evidence may arise under substantive law. But provided that such removal does not violate the substantive law regarding the destruction or spoliation of evidence, there is no ethical bar to ‘taking down’ such material from social media publications, or prohibiting a client’s lawyer from advising the client to do so, particularly inasmuch as the substance of the posting is generally preserved in cyberspace or on the user’s computer.”<sup>36</sup> When litigation is not pending or “reasonably anticipated,” a lawyer may more freely advise a client on what to maintain or remove from her social media profile.

A lawyer needs to be aware that the act of deleting electronically stored information does not mean that such information cannot be recovered through the use of forensic technology. This similarly is the case if a “live” posting is simply made “unlive.”

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<sup>34</sup> [New York County Lawyers’ Ass’n Comm. on Prof’l Ethics \(“NYCLA”\), Formal Op. 745 \(2013\).](#)

<sup>35</sup> [VOOM HD Holdings LLC v. EchoStar Satellite L.L.C., 93 A.D.3d 33, 939 N.Y.S.2d 321 \(1st Dep’t 2012\).](#)

<sup>36</sup> [NYCLA Formal Op. 745 \(July 2, 2013\).](#)

#### **Guideline No. 4.B: Adding New Social Media Content**

**A lawyer may advise a client with regard to posting new content on a social media website or profile, as long as the proposed content is not known to be false by the lawyer. A lawyer also may not “direct or facilitate the client's publishing of false or misleading information that may be relevant to a claim.”<sup>37</sup>**

NYRPC 3.1, 3.3, 3.4, 4.1, 4.2, 8.4.

*Comment:* A lawyer may review what a client plans to publish on a social media website in advance of publication and guide the client appropriately, including formulating a policy on social media usage. Subject to ethics rules, a lawyer may counsel the client to publish truthful information favorable to the client; discuss the significance and implications of social media posts (including their content and advisability); review how the factual context of a post may affect a person’s perception of the post; and how such posts might be used in a litigation, including cross-examination. A lawyer may advise a client to consider the possibility that someone may be able to view a private social media profile through court order, compulsory process, or unethical conduct.

#### **Guideline No. 4.C: False Social Media Statements**

**A lawyer is prohibited from proffering, supporting, or using false statements if she learns from a client’s social media posting that a client’s lawsuit involves the assertion of material false factual statement or evidence supports such a conclusion.<sup>38</sup>**

NYRPC 3.1, 3.3, 3.4, 4.1, 8.4.

*Comment:* A lawyer has an ethical obligation not to “bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.” NYRPC 3.1(a). Frivolous conduct includes the knowing assertion of “material factual statements that are false.” NYRPC 3.1(b)(3). See also NYRPC 3.3; 4.1 (“In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.”).

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<sup>37</sup> Id.

<sup>38</sup> Id.

#### **Guideline No. 4.D: A Lawyer's Use of Client-Provided Social Media Information**

**A lawyer may review the contents of the restricted portion of the social media profile of a represented person that was provided to the lawyer by her client, as long as the lawyer did not cause or assist the client to: (i) inappropriately obtain confidential information from the represented person; (ii) invite the represented person to take action without the advice of his or her lawyer; or (iii) otherwise overreach with respect to the represented person.**

NYRPC 4.2.

*Comment:* One party may always seek to communicate with another party. Where a “client conceives the idea to communicate with a represented party,” a lawyer is not precluded “from advising the client concerning the substance of the communication” and the “lawyer may freely advise the client so long as the lawyer does not assist the client inappropriately to seek confidential information or invite the nonclient to take action without the advice of counsel or otherwise to overreach the nonclient.”<sup>39</sup> New York interprets “overreaching” as prohibiting “the lawyer from converting a communication initiated or conceived by the client into a vehicle for the lawyer to communicate directly with the nonclient.”<sup>40</sup>

NYRPC Rule 4.2(b) provides that, notwithstanding the prohibition under Rule 4.2(a) that a lawyer shall not “cause another to communicate about the subject of the representation with a party the lawyer knows to be represented,”

a lawyer may cause a client to communicate with a represented person . . . and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person’s counsel that such communications will be taking place.

Thus, lawyers need to use caution when communicating with a client about her connecting to or “friending” a represented person and obtaining private information from that represented person’s social media site.

New Hampshire opines that a lawyer’s client may, for instance, send a “friend” request or request to follow a restricted Twitter feed of a person, and then provide the information to the lawyer, but the ethical propriety “depends on the extent to which the lawyer directs the client who is sending the [social media] request,” and whether the lawyer has complied with all other ethical obligations.<sup>41</sup>

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<sup>39</sup> [NYCBA Formal Op. 2002-3 \(2002\)](#).

<sup>40</sup> [Id.](#)

<sup>41</sup> [N.H. Bar Ass’n Ethics Advisory Comm., Op. 2012-13/05 \(2012\)](#).

In addition, the client's profile needs to "reasonably reveal[] the client's identity" to the other person.<sup>42</sup>

The American Bar Association opines that a "lawyer may give substantial assistance to a client regarding a substantive communication with a represented adversary. That advice could include, for example, the subjects or topics to be addressed, issues to be raised and strategies to be used. Such advice may be given regardless of who – the lawyer or the client – conceives of the idea of having the communication . . . . [T]he lawyer may review, redraft and approve a letter or a set of talking points that the client has drafted and wishes to use in her communications with her represented adversary."<sup>43</sup>

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<sup>42</sup> Id.

<sup>43</sup> [American Bar Ass'n Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-461 \(2011\).](#)

**5. RESEARCHING SOCIAL MEDIA PROFILES OR POSTS OF PROSPECTIVE AND SITTING JURORS AND REPORTING JUROR MISCONDUCT**

**Guideline No. 5.A: Lawyers May Conduct Social Media Research**

**A lawyer may research a prospective or sitting juror’s public social media website, account, profile, and posts.**

NYRPC 3.5, 4.1, 5.3, 8.4.

*Comment:* “Just as the internet and social media appear to facilitate juror misconduct, the same tools have expanded an attorney’s ability to conduct research on potential and sitting jurors, and clients now often expect that attorneys will conduct such research. Indeed, standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case.”<sup>44</sup>

**Guideline No. 5.B: A Juror’s Social Media Website, Profile, or Posts May Be Viewed As Long As There Is No Communication with the Juror**

**A lawyer may view the social media website, profile, or posts of a prospective juror or sitting juror provided that there is no communication (whether initiated by the lawyer, agent or automatically generated by the social media network) with the juror.**<sup>45</sup>

NYRPC 3.5, 4.1, 5.3, 8.4.

*Comment:* Lawyers should “always use caution when conducting [jury] research” to ensure that no communication with the prospective or sitting jury takes place.<sup>46</sup> New York opinions have stated that even inadvertent contact with a prospective juror or sitting juror caused by an automatic notice sent by a social media network may be considered a technical ethical violation. However, such opinions have not taken a definitive position that such unintended automatic contact is subject to discipline.<sup>47</sup>

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<sup>44</sup> See [NYCBA Formal Op. 2012-02 \(2012\)](#).

<sup>45</sup> See [NYCLA Formal Op. 743 \(2011\)](#); [NYCBA Formal Op. 2012-2 \(2012\)](#); see also [Oregon State Bar Comm. on Legal Ethics, Formal Op. 189 \(2013\)](#).

<sup>46</sup> [Vincent J. Syracuse & Matthew R. Maron, Attorney Professionalism Forum, 85 N.Y. St. B.A.J. 50 \(2013\)](#).

<sup>47</sup> See [NYCBA Formal Op. 2012-2 \(2012\)](#); [NYCLA Formal Op. 743 \(2011\)](#).

A lawyer reviewing social media to perform juror research must be aware that an automated notice may be sent to the prospective or sitting juror identifying the name of the person viewing the juror's social media account.<sup>48</sup> For instance, currently, if a lawyer logged into LinkedIn then performed a simple Google search and clicked on a link to a LinkedIn account of a juror an automatic message may be sent by LinkedIn to the person whose profile is viewed. In order for the lawyer's profile not to be identified through LinkedIn when viewing a person's public LinkedIn profile, the lawyer must change her settings so that she is anonymous or, alternatively, be fully logged out of her LinkedIn account.

New York opinions draw a distinction between public and private juror information.<sup>49</sup> They opine that viewing the public portion of a social media profile is ethical as long as there is no automatic message sent to the account owner of such viewing (assuming other ethics rules are not implicated by such viewing). New York opinions, however, have not directly addressed whether a lawyer may non-deceptively view a social media account that from a prospective or sitting juror's view is putatively private, which the lawyer has a right to view, such as an alumni social network where both the lawyer and juror are members.

#### **Guideline No. 5.C: Deceit Shall Not Be Used to View a Juror's Social Media Profile**

**A lawyer may not make misrepresentations or engage in deceit in order to be able to view the social media, account, profile, or posts of a prospective juror or sitting juror, nor may a lawyer direct others to do so.**

NYRPC 3.5, 4.1, 5.3, 8.4.

*Comment:* An “attorney must not use deception—such as pretending to be someone else—to gain access to information about a juror that would otherwise be unavailable”.<sup>50</sup>

#### **Guideline No. 5.D: Juror Contact During Trial**

**After a juror has been sworn and until a trial is completed, a lawyer may view or monitor the social media profile or posts of a juror provided that there is no communication (whether initiated by the lawyer, agent or automatically generated by the social media network) with the juror.**

NYRPC 3.5, 4.1, 5.3, 8.4.

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<sup>48</sup> Id.

<sup>49</sup> Id.

<sup>50</sup> See [NYCBA Formal Op. 2012-02 \(2012\)](#); [NYCLA Formal Op. 743 \(2011\)](#).

*Comment:* The concerns and issues identified in the comments to Guideline No. 5.C. are also applicable during the evidentiary and deliberative phases of a trial. These phases present additional issues, such as a lawyer wishing to monitor juror social media profiles or posts in order to determine whether a juror is failing to follow court instructions or engaging in other improper behavior. However, the risks posed at this stage of a litigation are greater than during the jury selection process and could result in a mistrial.<sup>51</sup>

[W]hile an inadvertent communication with a venire member may result in an embarrassing revelation to a court and a disqualified panelist, a communication with a juror during trial can cause a mistrial. The Committee therefore re-emphasizes that it is the attorney's duty to understand the functionality of any social media service she chooses to utilize and to act with the utmost caution.<sup>52</sup>

**Guideline No. 5.E: Juror Misconduct**

In the event a lawyer learns of possible juror misconduct, whether as a result of reviewing a sitting juror's social media profile or posts, or otherwise, she must promptly bring it to the court's attention.<sup>53</sup>

NYRPC 3.5, 8.4.

*Comments:* “[A] lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of her family of which the lawyer has knowledge.” NYRPC 3.5(d). If a lawyer learns of juror misconduct due to social media research, he or she must promptly notify the court.<sup>54</sup>

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<sup>51</sup> Rather than risk inadvertent contact with a juror, a lawyer wanting to monitor juror social media behavior might consider seeking a court order clarifying what social media may be accessed.

<sup>52</sup> See [NYCBA Formal Op. 2012-2 \(2012\)](#).

<sup>53</sup> See [NYCLA Op. 743 \(2011\)](#); [NYCBA Op. 2012-2 \(2012\)](#).

<sup>54</sup> Id.



## **APPENDIX**

### **DEFINITIONS**

**Social Media** (also called a social network): An Internet-based service allowing people to share content and respond to postings by others. Popular examples include Facebook, Twitter, YouTube, Google+, LinkedIn, Foursquare, Pinterest, Instagram, and Reddit. Social media may be viewed via, websites, mobile or desktop applications, text messaging or other electronic communications.

**Restricted**: Information that is not available to a person viewing a social media account because an existing on-line relationship between the member of the account and the person seeking to view it is lacking (whether directly, *e.g.*, a direct Facebook “friend,” or indirectly, *e.g.*, a Facebook “friend of a friend”). Note that content intended to be “restricted” may be “public” through user error in seeking to protect such content, through re-posting by another member of that social media network, or as a result of how technologically the content is made available by the social media network.

**Public**: Information available to anyone viewing a social media network without the need for permission from the person whose account is being viewed. Public information includes content available to all members of a social media network and content that is accessible to non-members.

**Friending**: The process through which the member of a social media network designates another person as a “friend” in response to a request to access Restricted information. “Friending” may enable a member’s “friends” to view the member’s restricted content. “Friending” may also create a publicly viewable identification of the relationship between the two users. “Friending” is the term used by Facebook, but other social media networks use analogous concepts such as “circles” on Google+ or “follower” or “f” on Twitter.

**Posting or Post**: Uploading public or Restricted content to a social media network. A post contains information provided by the person, and specific social media networks may use their own term equivalent to a post (*e.g.*, “Tweets” on Twitter).

**Profile**: Accessible information about a specific social media member. Some social media networks restrict access to members while other networks permit a member to restrict, in varying degrees, a person’s ability to view specified aspects of a member’s account or profile. A profile contains, among other things, biographical and personal information about the member. Depending on the social media network, a profile may include information provided by the member, other members of the social media network, the social media network, or third-party databases.



# UNITED STATES OFFICE OF GOVERNMENT ETHICS



April 9, 2015  
LA-15-03

## LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: David J. Apol  
General Counsel

SUBJECT: The Standards of Conduct as Applied to Personal Social Media Use

Use of social media has become prevalent among Federal executive branch employees and agencies. The U.S. Office of Government Ethics (OGE) is aware that agency ethics officials have an interest in understanding how the Standards of Ethical Conduct for Executive Branch Employees (Standards of Conduct), 5 C.F.R. part 2635, apply to the use of social media. This interest is reflected in the increased volume of questions that OGE receives from various agencies seeking advice in this area.

As an initial matter, the Standards of Conduct do not prohibit executive branch employees from establishing and maintaining personal social media accounts. As in any other context, however, employees must ensure that their social media activities comply with the Standards of Conduct and other applicable laws, including agency supplemental regulations and agency-specific policies. To assist employees and agency ethics officials in this endeavor, OGE is providing the following guidance regarding issues that agency ethics official have frequently raised concerning employees' obligations under the Standards of Conduct when using social media.<sup>1</sup>

### **1. Use of Government Time and Property**

When employees are on-duty, the Standards of Conduct require that they use official time in an honest effort to perform official duties. *See* 5 C.F.R. § 2635.705. As a general matter, this requirement limits the extent to which employees may access and use their personal social media

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<sup>1</sup> Employees should remain aware that other statutes and regulations outside of OGE's purview may further limit their use of social media. For example, the Hatch Act, 5 U.S.C. § 7321, *et seq.*, limits the extent to which executive branch employees may use social media to engage in certain political activities. *See* U.S. Office of Special Counsel, *Frequently Asked Questions Regarding the Hatch Act and Social Media*, April 4, 2012, available at: <https://osc.gov/Resources/Social%20Media%20and%20the%20Hatch%20Act%202012.pdf>

accounts while on duty. The Standards of Conduct also require employees to protect and conserve government property and to use government property only to perform official duties, unless they are authorized to use government property for other purposes. *See* 5 C.F.R. § 2635.704. For example, under the Standards of Conduct, a supervisor may not order, or even ask, a subordinate to work on the supervisor's personal social media account. Coercing or inducing a subordinate to maintain the supervisor's personal account would amount to a misuse of position and, if done on official time, a misuse of official time. The same would be true if the supervisor were to have a subordinate create content for the supervisor's personal account, even if the subordinate were not involved in uploading the content to that account. 5 C.F.R. §§ 2635.702(a), 2635.705(b).

Where agencies have established policies permitting limited personal use of government resources by their employees, those policies control what constitutes an authorized use of government resources. *See, e.g.* OGE Informal Advisory Opinion 97 x 3. In some cases, such "limited use" policies may authorize employees to access their personal social media accounts while on duty.

## **2. Reference to Government Title or Position & Appearance of Official Sanction**

A question that frequently arises is the extent to which employees may reference their official titles on their personal social media accounts. In general, the Standards of Conduct prohibit employees from using their official titles, positions, or any authority associated with their public offices for private gain. 5 C.F.R. § 2635.702. The Standards of Conduct also require that employees avoid using their titles or positions in any manner that would create an appearance that the Government sanctions or endorses their activities or those of another. 5 C.F.R. §§ 2635.702; 2635.807(b).<sup>2</sup>

Employees' use of personal social media ordinarily will not create the impermissible appearance of governmental sanction or endorsement which would be prohibited under § 2635.702(b). An employee does not, for example, create the appearance of government sanction merely by identifying his or her official title or position in an area of the personal social media account designated for biographical information. *See e.g.* OGE Legal Advisory LA-14-08; OGE Informal Advisory Opinion 10 x 1.

In evaluating whether a reference to an employee's official title or position on social media violates the Standards of Conduct, the agency ethics official must consider the totality of the circumstances to determine whether a reasonable person with knowledge of the relevant facts would conclude that the government sanctions or endorses the communication. *See, e.g.* 5 C.F.R. §§ 2635.702(b); 2635.807(b); OGE Legal Advisory LA-14-08; OGE Informal Advisory Opinion 10 x 1. Relevant factors for agency ethics officials to consider in making the determination include:

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<sup>2</sup> Agency supplemental regulations may place further limitations on employees' use of title or position, or may impose additional requirements such as mandating the use of a disclaimer.

- Whether the employee states that he or she is acting on behalf of the government;
- Whether the employee refers to his or her connection to the government as support for the employee's statements;
- Whether the employee prominently features his or her agency's name, seal, uniform or similar items on the employee's social media account or in connection with specific social media activities;
- Whether the employee refers to his or her government employment, title, or position in areas other than those designated for biographical information;
- Whether the employee holds a highly visible position in the Government, such as a senior or political position, or is authorized to speak for the Government as part of the employee's official duties;
- Whether other circumstances would lead a reasonable person to conclude that the government sanctions or endorses the employees' social media activities; or
- Whether other circumstances would lead a reasonable person to conclude that the government does not sanction or endorse the employees' social media activities.

Ordinarily, an employee is not required to post a disclaimer disavowing government sanction or endorsement on the employee's personal social media account. Where confusion or doubt is likely to arise regarding the personal nature of social media activities, employees are encouraged to include a disclaimer clarifying that their social media communications reflect only their personal views and do not necessarily represent the views of their agency or the United States. A clear and conspicuous disclaimer will usually be sufficient to dispel any confusion that arises. *See* OGE Legal Advisory LA-14-08.

### **3. Recommending and Endorsing Others on Social Media**

Social media networks, particularly those focused on job seeking, sometimes allow users to recommend or endorse the skills of other users. The Standards of Conduct permit employees to use social media to make such recommendations or endorsements in their personal capacity. It is not a misuse of position for employees to provide such endorsements merely because they have provided their official titles or positions in areas of their personal social media accounts that are designated for biographical information.

OGE is aware that at least one social media service automatically adds a user's name, title, and employer to any recommendation that the user posts regarding a job seeker. In any such case where title and employer name are added automatically, OGE does not consider a

recommendation to constitute a misuse of position because the recommendation is readily understood by users of the social media service to be personal, rather than official, in nature. An employee should not, however, affirmatively choose to include a reference to the employee's title, position, or employer in a recommendation, except where 5 C.F.R. § 2635.702(b) expressly permits such references.

#### **4. Seeking Employment Through Social Media**

The basic provisions governing seeking employment are set out in subpart F of the Standards of Conduct. For these purposes "seeking employment" includes not only the kinds of bilateral employment negotiations that would implicate 18 U.S.C. § 208, but also certain unilateral expressions of interest in employment by the employee. Specifically, in addition to actual negotiations, as described in section 2635.603(b)(1)(i), seeking employment also includes unsolicited communications by the employee regarding possible employment, as described in section 2635.603(b)(1)(ii), and any response by the employee, other than rejection, to an unsolicited overture from a prospective employer, as described in section 2635.603(b)(1)(iii). *See* OGE Informal Advisory Opinion 04 x 13.

Employees who are seeking or negotiating for employment through social media must comply with the applicable disqualification requirements of 5 C.F.R. § 2635.601, *et seq.*, 18 U.S.C. § 208, and any additional requirements found in agency supplemental regulations. Public financial disclosure filers who are negotiating or have an arrangement concerning future employment or compensation also must comply with the notification requirements found in section 17 of the Stop Trading on Congressional Knowledge Act of 2012. *See* 5 U.S.C. app. § 101, note; OGE Legal Advisories LA-13-06 and LA-12-01.

An employee is not considered to be seeking employment with any person or organization merely because the employee has posted a resume or similar summary of professional experience to the employee's personal social media account. Likewise, an employee is not considered to be seeking employment merely because a person or organization has viewed the employee's resume on that social media account or has sent an unsolicited message, including one containing a job offer, to the employee. An employee who receives an unsolicited message or job offer is seeking employment with the sender only if the employee responds to the message and the employee's response is anything other than a rejection. 5 C.F.R. § 2635.603.

An employee will be considered to be seeking employment with a person or an organization if the employee contacts that person or organization concerning future employment. In the age of social media, there are a multitude of ways that an employee might contact a prospective employer and thereby trigger the seeking employment rules. For example, an employee would trigger the seeking employment rules by sending a message directly to the organization, uploading a resume or application to the prospective employer's social media account for recruiting employees, or otherwise targeting the organization through a social media communication.

## **5. Disclosing Nonpublic Information**

The Standards of Conduct prohibit employees from disclosing nonpublic information to further their private interests or the private interests of others. *See* 5 C.F.R. § 2635.703. This prohibition applies without regard to the medium used for the unauthorized disclosure. In addition to the Standards of Conduct, other statutes and regulations prohibit the disclosure of specific categories of nonpublic information, such as classified or confidential information. Employees must follow the rules regarding the disclosure of nonpublic information found in the Standards of Conduct and all other applicable rules when using social media. The Standards of Conduct generally do not prevent employees from discussing or sharing government information that is publicly available. Employees may not, however, accept compensation for statements or communications made over social media that relate to their official duties. *See* 5 C.F.R. §§ 2635.807(a); 2635.703.

## **6. Personal Fundraising**

Employees may use personal social media accounts to fundraise for nonprofit charitable organizations in a personal capacity, but they must comply with 5 C.F.R. § 2635.808, the section of the Standards of Conduct that covers fundraising. As a general rule, fundraising solicitations over social media are permissible so long as the employee does not “personally solicit” funds from a subordinate or a known prohibited source. *See* 5 C.F.R. § 2635.808(c)(1).

Fundraising requests over social media are potentially visible to a wide audience of followers and connections. An employee who posts or publishes a general fundraising announcement or request over social media has not “personally solicited” any prohibited source or subordinate merely because the employee is connected with the prohibited source or subordinate through the social media network. The same is true even if the prohibited source or subordinate views, comments on, or responds to the post. However, an employee may not respond to inquiries posted by prohibited sources or subordinates in reference to the fundraising request. Furthermore, an employee may not specifically reference, link to, or otherwise target a subordinate or known prohibited source when fundraising over social media. An employee doing so will be considered to have “personally solicited” that person in violation of 5 C.F.R. § 2635.808(c)(1). *See* OGE Informal Advisory Opinion 93 x 19; OGE Informal Advisory Opinion 93 x 8.

Additionally, employees may not use their official titles, positions, or authority associated with their positions to further fundraising efforts. *See* 5 C.F.R. § 2635.808(c)(2); OGE Informal Advisory Opinion 96 x 2. Employees are not considered to have used their official titles, positions, or authority associated with their positions to further fundraising efforts merely because they have provided this information in areas of their personal social media accounts designated for biographical information.

## **7. Official Social Media Accounts**

Many Federal agencies maintain one or more official social media accounts for use in conducting official business. Subject to applicable legal authorities, each agency determines the



purposes for which its official accounts may be used. *See, e.g.* OGE Informal Advisory Opinions 93 x 6 and 93 x 24. When employees use these official accounts, they must do so in accordance with applicable agency directives, regulations, and policies. *See* 5 C.F.R. § 2635.704(a); OGE Informal Advisory Opinion 97 x 3. Put simply, official accounts are for official purposes.

OGE encourages agencies to adopt policies indicating which employees are authorized to access official accounts and defining the authorized uses for those accounts. Agency officials responsible for social media accounts may wish to visit the General Services Administration's online Federal Social Media Community of Practice and Social Media Registry at <http://www.digitalgov.gov/>.

### **Additional Information**

In light of the ever evolving nature of social media, the foregoing advice is not intended to be comprehensive. OGE expects to issue additional guidance in the future addressing questions outside the scope of this Legal Advisory. Designated Agency Ethics Officials with questions regarding the application of the Standards of Conduct to social media may contact their assigned OGE Desk Officers.



New York County Lawyers Association Professional Ethics Committee

Formal Opinion 748

March 10, 2015

TOPIC: The ethical implications of attorney profiles on LinkedIn

DIGEST: Attorneys may maintain profiles on LinkedIn, containing information such as education, work history, areas of practice, skills, and recommendations written by other LinkedIn users. A LinkedIn profile that contains only one's education and current and past employment does not constitute Attorney Advertising. If an attorney includes additional information in his or her profile, such as a description of areas of practice or certain skills or endorsements, the profile may be considered Attorney Advertising, and should contain the disclaimers set forth in Rule 7.1. Categorizing certain information under the heading "Skills" or "Endorsements" does not, however, constitute a claim to be a "Specialist" under Rule 7.4, and is accordingly not barred, provided that the information is truthful and accurate.

Attorneys must ensure that all information in their LinkedIn profiles is truthful and not misleading, including endorsements and recommendations written by other LinkedIn users. If an attorney believes an endorsement or recommendation is not accurate, the attorney should exclude it from his or her profile. New York lawyers should periodically monitor and review the content of their LinkedIn profiles for accuracy.

RULES OF PROFESSIONAL CONDUCT: 7.1 and 7.4

OPINION

LinkedIn, the business-oriented social networking service, has grown in popularity in recent years, and is now commonly used by lawyers. The site provides a platform for users to create a profile containing background information, such as work history and education, and links to other users they may know based on their experience or connections. Lawyers may use the site in several ways, including to communicate with acquaintances, to locate someone with a particular skill or background—such as a law school classmate who practices in a certain jurisdiction for assistance on a matter—or to keep up-to-date on colleagues' professional activities and job changes.

The site also allows users and their connections to list certain skills, interests, and accomplishments, creating a profile similar to a resume or law firm biography. Users can list their own experience, education, skills, and interests, including descriptions of their practice areas and prior matters. Other users may also "endorse" a lawyer for certain skills—such as litigation or matrimonial law—as well as write a recommendation as to the user's professional skills.<sup>1</sup>

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<sup>1</sup> This opinion addresses the fields, headings, and protocols of LinkedIn as they exist on the date of this opinion. The committee cannot anticipate changes or additions to this or other social networking sites, and limits this analysis to the site as of the date of this opinion.

This opinion addresses the ethical implications of LinkedIn profiles: specifically, whether a LinkedIn Profile is considered “Attorney Advertising,” when it is appropriate for an attorney to accept endorsements and recommendations, and what information attorneys should include (and exclude) from their LinkedIn profiles to ensure compliance with the New York Rules of Professional Conduct.<sup>2</sup>

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LinkedIn allows a user to provide objective, biographical information such as one’s “Education” and “Experience,” as well as subjective information, such as “Skills,” “Endorsements,” and “Recommendations.” LinkedIn users can control the fields they choose to populate. Some users may only list education and work experience, while other users may include more extensive information, such as skills, endorsements, and recommendations. Furthermore, the information in one’s profile visible to others may vary depending on whether the viewer located the profile through an external search engine such as Google, whether the viewer is logged in to LinkedIn on the computer being used, or whether the viewer is “connected” on LinkedIn to the person whose profile he or she is viewing.

In light of the varied information an attorney may provide on his or her profile, and which information is visible to online users, the use of LinkedIn raises concerns about what aspects of an attorney’s profile constitute “Attorney Advertising,” which is subject to specific ethical rules, and what aspects do not. The New York Rules of Professional Conduct define attorney advertising as “communications made in any form about the lawyer or the law firm’s services, the primary purpose of which is retention of the lawyer or law firm for pecuniary gain as a result of the communication. RPC 7.1. The rules further delineate what information an attorney may include in an advertisement—such as education, past experience, fee arrangements, testimonials or endorsements (NYRPC 7.1(b), (d))—and what information an attorney may not include in an advertisement—such as undisclosed paid endorsements or certain trade names. RPC 7.1(c). Online advertisements must be labeled “Attorney Advertising” “on the first page, or on the home page in the case of a website” (*Id.* at 7.1(f)) and any advertisement containing statements about the lawyer’s services, testimonials, or endorsements must include the disclaimer “[p]rior results do not guarantee a similar outcome.” *Id.* at 7.1(e)(3).

The comments to the rules make clear that “[n]ot all communications made by lawyers about the lawyer or the law firm’s services are advertising” as the advertising rules do not encompass communications with current clients or former clients germane to the client’s earlier representation. RPC 7.1, Cmt. [6]. Likewise, communications to “other lawyers . . . are excluded from the special rules governing lawyer advertising even if their purpose is the retention of the lawyer or law firm.” *Id.* Cmt. [7].

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<sup>2</sup> This opinion is limited to the committee’s analysis of the New York Rules of Professional Conduct. Attorneys should be aware that other jurisdictions may have different ethical rules, and should consult those rules where appropriate.

Applying these rules to LinkedIn profiles, it is the opinion of this Committee that a LinkedIn profile that contains only biographical information, such as a lawyer's education and work history, does not constitute an attorney advertisement. An attorney with certain experience such as a Supreme Court clerkship or government service may attract clients simply because the experience is impressive, or knowledge gained during that position may be useful for a particular matter. As the comments to the New York Rules of Professional Conduct make clear, however, not all communications, including communications that may have the ultimate purpose of attracting clients, constitute attorney advertising. Thus, the Committee concludes that a LinkedIn profile containing *only* one's education and a list of one's current and past employment falls within this exclusion and does not constitute attorney advertising.<sup>3</sup>

The additional information that LinkedIn allows users to provide beyond one's education and work history, however, implicates more complicated ethical considerations. First, do LinkedIn fields such as "Skills" and "Endorsements" constitute a claim that the attorney is a specialist, which is ethically permissible only where the attorney has certain certifications set forth in RPC 7.4? Second, even if certain statements do not constitute a claim that the attorney is a specialist, do such statements nonetheless constitute attorney advertising, which may require the disclaimers set forth in RPC 7.1?

#### a. Specialization

New York Rule of Professional Conduct 7.4 prohibits an attorney from identifying herself as a "specialist" or "specializ[ing] in a particular field of law" unless the attorney has been certified by an appropriate organization or jurisdiction. RPC 7.4(a)–(c). The New York State Bar Association (NYSBA), interpreting the New York Rules of Professional Conduct, concluded in a 2013 opinion that "a lawyer or law firm listed on a social media site may . . . identify one or more areas of law practice [but] to list those areas under a heading of 'Specialties' would constitute a claim that the lawyer or law firm 'is a specialist or specializes in a particular field of law,'" and would likely run afoul of Rule 7.4, unless the attorney's certifications meet the requirements of that Rule. *See* NYSBA Ethics Opinion 972 (June 26, 2013).

While NYSBA has addressed the ethical implications of the heading "Specialties," the applicability of these guidelines to LinkedIn fields such as "Skills," "Endorsements," and "Recommendations" has not been previously addressed in New York. Further complicating this question is the fact that LinkedIn profile headings are not chosen by users. The LinkedIn website provides certain default fields, from which users can choose to add to their profiles. NYSBA advises users who are concerned about these headings to consider avoiding them entirely, by "includ[ing] information about the lawyer's experience elsewhere, such as under another heading or in an untitled field that permits biographical information to be included." Social Media Ethics Guidelines of the

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<sup>3</sup> Of course, as with all statements made by an attorney, either to a client, an adversary, or a judge, the biographical information must be truthful and not misleading. *See* RPC 7.1, Cmt. [6].

Commercial Federal Litigation Section of the New York State Bar Association at 4 (Mar. 18, 2014) available at <http://www.nysba.org/workarea/DownloadAsset.aspx?id=47547>.

With respect to skills or practice areas on lawyers' profiles under a heading, such as "Experience" or "Skills," this Committee is of the opinion that such information does not constitute a claim to be a specialist under Rule 7.4. The rule contemplates advertising regarding an attorney's practice areas, noting that an attorney may "publicly identify one or more areas of law in which the lawyer or law firm practices, or may state that the practice of the lawyer or law firm is limited to one or more areas of law, provided that the lawyer or law firm shall not state that the lawyer or law firm is a specialist or specializes in a particular field of law, except as provided in Rule 7.4(c)." RPC 7.4(a). This provision contemplates the distinction between claims that an attorney has certain experience or skills and an attorney's claim to be a "specialist" under Rule 7.4. Categorizing one's practice areas or experience under a heading such as "Skills" or "Experience" therefore, does not run afoul of RPC 7.4, provided that the word "specialist" is not used or endorsed by the attorney, directly or indirectly. Attorneys should periodically monitor their LinkedIn pages at reasonable intervals to ensure that others are not endorsing them as specialists.

#### b. Endorsements and Recommendations

Endorsements and recommendations written by other LinkedIn users raise additional ethical considerations. While these endorsements and recommendations originate from other users, they nonetheless appear on the attorney's LinkedIn profile. The ethical treatment of endorsements and recommendations depends on who is considered to "own" the endorsement and recommendation: the author of the endorsement or recommendation or the person whose profile is enhanced by it.

Because LinkedIn gives users control over the entire content of their profiles, including "Endorsements" and "Recommendations" by other users (by allowing an attorney to accept or reject an endorsement or recommendation), we conclude that attorneys are responsible for periodically monitoring the content of their LinkedIn pages at reasonable intervals. To that end, endorsements and recommendations must be truthful, not misleading, and based on actual knowledge pursuant to Rule 7.1. For example, if a distant acquaintance endorses a matrimonial lawyer for international transactional law, and the attorney has no actual experience in that area, the attorney should remove the endorsement from his or her profile within a reasonable period of time, once the attorney becomes aware of the inaccurate posting. If a colleague or former client, however, endorses that attorney for matrimonial law, a field in which the attorney has actual experience, the endorsement would not be considered misleading. The Pennsylvania Bar Association, interpreting the Pennsylvania Rules of Professional Conduct, reached a similar conclusion in a 2014 opinion, emphasizing that an attorney must "monitor his or her social networking websites, [] verify the accuracy of any information posted, [and] remove or correct any inaccurate endorsements. . . . This obligation exists regardless of whether the information was posted by the attorney, by a client, or by a third party."

Pennsylvania Bar Association Formal Op. 2014-300, “Ethical Obligations for Attorneys Using Social Media,” at 12. While we do not believe that attorneys are ethically obligated to review, monitor and revise their LinkedIn sites on a daily or even a weekly basis, there is a duty to review social networking sites and confirm their accuracy periodically, at reasonable intervals.

### c. LinkedIn Profiles as “Attorney Advertising” and Appropriate Disclaimers

Finally, if an attorney chooses to include information such as practice areas, skills, endorsements, or recommendations, the attorney must treat his or her LinkedIn profile as attorney advertising and include appropriate disclaimers pursuant to Rule 7.1. As discussed above, not all communications are advertising, and a LinkedIn profile containing nothing more than biographical information would not ordinarily be considered an advertisement. But a LinkedIn profile that includes subjective statements regarding an attorney’s skills, areas of practice, endorsements, or testimonials from clients or colleagues is likely to be considered advertising.

Attorneys who wish to include this information should review Rule 7.1 to determine the appropriate language to include in their profiles. While the Committee declines to provide guidelines for all potential profile content, the Committee provides the following recommendations for attorneys’ consideration and directs attorneys to review Rule 7.1 before creating or significantly amending their LinkedIn profiles.

If an attorney’s LinkedIn profile includes a detailed description of practice areas and types of work done in prior employment, the user should include the words “Attorney Advertising” on the lawyer’s LinkedIn profile. *See* RPC 7.1(f). If an attorney also includes (1) statements that are reasonably likely to create an expectation about results the lawyer can achieve; (2) statements that compare the lawyer’s services with the services of other lawyers; (3) testimonials or endorsements of clients; or (4) statements describing or characterizing the quality of the lawyer’s or law firm’s services, the attorney should also include the disclaimer “Prior results do not guarantee a similar outcome.” *See* RPC 7.1(d) and (e). Because the rules contemplate “testimonials or endorsements,” attorneys who allow “Endorsements” from other users and “Recommendations” to appear on one’s profile fall within Rule 7.1(d), and therefore must include the disclaimer set forth in Rule 7.1(e). An attorney who claims to have certain skills must also include this disclaimer because a description of one’s skills—even where those skills are chosen from fields created by LinkedIn—constitutes a statement “characterizing the quality of the lawyer’s [] services” under Rule 7.1(d).

### Conclusion

Attorneys may maintain profiles on LinkedIn, containing information such as education, work history, areas of practice, skills, and recommendations written by other LinkedIn users. A LinkedIn profile that contains only one’s education and current and past employment does not constitute Attorney Advertising. If an attorney includes additional information in his or her profile, such as a description of areas of practice or certain skills

or endorsements, the profile may be considered Attorney Advertising and should contain the disclaimers set forth in Rule 7.1. Categorizing certain information under the heading “Skills” or “Endorsements” does not, however, constitute a claim to be a “Specialist” under Rule 7.4, and is accordingly not barred, provided that the information is truthful and accurate.

Attorneys must ensure that all information in their LinkedIn profiles, including endorsements and recommendations written by other LinkedIn users, is truthful and not misleading. If an attorney believes an endorsement or recommendation is not accurate, the attorney should exclude it from his or her profile. New York lawyers should periodically monitor and review the content of their LinkedIn profiles for accuracy.

# Ethics Jeopardy



Choose a category.  
Here, we ask the question.  
You must give the correct  
answer.

[Click to begin.](#)



Choose a point value.

Choose a point value.

[Click here for](#)  
[Final Jeopardy](#)



On Line Reviews	Linked in Together	Friends to Tweet About	Judging Social Media	Using the ‘Net	I’ll Blog That...
<u>\$100</u>	<u>\$100</u>	<u>\$100</u>	<u>\$100</u>	<u>\$100</u>	<u>\$100</u>
<u>\$200</u>	<u>\$200</u>	<u>\$200</u>	<u>\$200</u>	<u>\$200</u>	<u>\$200</u>
<u>\$300</u>	<u>\$300</u>	<u>\$300</u>	<u>\$300</u>	<u>\$300</u>	<u>\$300</u>
<u>\$400</u>	<u>\$400</u>	<u>\$400</u>	<u>\$400</u>	<u>\$400</u>	<u>\$400</u>
<u>\$500</u>	<u>\$500</u>	<u>\$500</u>	<u>\$500</u>	<u>\$500</u>	<u>\$500</u>

**Is it permissible for a lawyer to  
discuss opinions about judges on  
a blog?**

**No...unless you want to be fined  
and reprimanded**

**Back to  
Game**

**Where a client gives a lawyer a negative review on-line,  
is it OK for the lawyer to respond in kind with  
negative information about the client?**

**No, according to the GA Supreme Court  
In re Skinner, 292 GA. 640 (2013)**

**[Back to  
Game](#)**

**Where a non-lawyer staff member at a law firm updated the firm's website and did not list information accurately, is a lawyer to blame?**

**Yes, Sup. Ct. of LA, Attorney Disciplinary  
Proceedings, No. 10-B-2118 (2010)**

**Back to  
Game**

**Is a law firm website limited to using just the name of the firm when setting up a “domain name” for the firm’s website?**



**No. But see, RPC 7.5(e)**

**Back to**  
**Game**

**Can a lawyer offer discounted legal services through social media sites such as Groupon?**

**Yes. See, NYS Bar Assoc. Comm. On Prof. Ethics Op. 897 (2011)**

**Back to**  
**Game**

**Must a lawyer use accurate  
information in their LinkedIn  
Profile?**

**Yes , see Rule 7.1**

**Back to**  
**Game**

**Is it ethical for a lawyer to friend or connect with someone who is not a client for the purpose of gaining access to information in a matter?**

**It depends. PA Bar Assoc. Prof.  
Guidance Op. 2009-02; Rule 4.3, Rule  
8.4**

**NYC Formal Op. 2010-2**

**San Diego Bar Advisory Op. 2011-2**

**OR State Bar Assoc. Formal Op.  
2013-189; MA Op. 2014-5**

**[Back to  
Game](#)**

**As part of business development, is it permissible for a lawyer to post reviews on-line about another lawyer as if she were a client?**



# No. In re Petition....MN Supreme Court 2013

[Back to  
Game](#)

**Can the following be included in a Craig's List ad for a legal secretary: If interested, please send current resume and a few pictures along with a description of your physical features, including measurements. We look forward to meeting you?**

**No. It will get you suspended in IL**

**Back to**  
**Game**

**May a law firm provide links on their website to other services/sources?**

**Yes. NYS Bar Assoc. Comm. on Prof.  
Ethics, Op. 888 (2011)**

**[Back to  
Game](#)**

**Name one ethical trap for lawyers using the Facebook Messenger feature with people seeking legal advice.**

**Attorneys may inadvertently create an attorney-client relationship**

**Back to**  
**Game**

**Is there an expectation of privacy where lawyers and clients use social media?**



**No. See, People v Harris (NY 2010)**

**Back to**  
**Game**

**If a law firm issues press releases to inform potential clients of new investigations or action, and sends tweets to alert recipients to the press releases, then are the press releases and tweets advertisements governed by Rule 7.1?**

**Yes.**

**ABCNY Formal Op. 2012-03**

**Back to**  
**Game**

**Must a lawyer post truthful information  
about their personal life in an on-line  
dating ad?**

**Apparently yes. In re O'Hare, NY AD 2  
Dept. 2013**

**Back to  
Game**

**Can a lawyer ethically use social media information obtained by the client about parties, but not obtained by the lawyer?**

**Yes.**

**NH Op. 2012-13/05**

**ABA Formal Op. 11-460**

**[Back to  
Game](#)**

**May a judge post off-color jokes on his  
private family server?**



**No. Ask 9<sup>th</sup> Cir. Judge Kozinski about  
this**

**Back to  
Game**

**Is it a good idea for a judge to take a nude selfie and share it with Court personnel?**

**No, no, no...ask Michigan Judge  
McCree**

**[Back to  
Game](#)**

**Is it appropriate for a judge to send text messages from the bench to help counsel appearing in the matter at hand?**

**No, ask Texas Judge Elizabeth Coker**

**[Back to  
Game](#)**

# May Judges be friends with Lawyers on Facebook?

**Yes with caveats. FL, SC, KY, NY**

**Back to**  
**Game**

**May a judge use social media to contact an attorney in a current case?**



# No. NC Judicial Standards Commission

[Back to  
Game](#)

**May Federal Government employees  
use their official titles on social media  
platforms?**

**It depends. OGE LA-15-03**

**Back to**  
**Game**

**May a government lawyer use social media to fundraise for a non-profit organization?**

**Generally Yes....OGE LA-15-03**

**Back to**  
**Game**

**May lawyers using LinkedIn categorize certain information under the heading “skills” or “endorsements” without claiming to be a “specialist”?**

**Yes. See Rules 7.1, 7.4**

**Back to**  
**Game**

**May a lawyer ethically advise a client with regard to posting new content on a social media website or profile?**



# Yes. NYSBA Social Media Ethics Guide

[Back to  
Game](#)

**May a lawyer answer legal questions in chat rooms or on other social media sites on the Internet? If so, may the lawyer also offer his or her legal services in the course of answering questions?**

**It depends. Rule 7.3(a)**

**NYSBA Social Media Ethics Guide**

**NYSBA Op. 899**

**Philadelphia Bar Association Op.  
2010-6**

**[Back to  
Game](#)**

**What are two strategies that can be used to avoid the formation of an attorney-client relationship on a blog?**

**Limit reader feedback, keep information general,  
use a disclaimer**

**Is it ethical for a lawyer to share observations about a judge on his blog ?**

**No. Check in with attorney Sean Conway**  
**FL Rules 4-8.2(a)**  
**NY Rules 8.2(a) and 4-8.4(d)**

**Back to**  
**Game**

**Should a lawyers who friend judges on Facebook  
post about activities when they should have been  
in court?**



**No. Ask the Texas Lawyer who got caught**

**Back to**  
**Game**

**May a lawyer view the public portion of a person's social media profile or posts if such person is represented by another lawyer?**

**Yes, NYSBA Social Media Ethics Guidelines**

**Back to**  
**Game**

**Is it ethical for a lawyer to mention cases on her blog?**

**No. An IL Assistant PD was suspended**

**Back to**  
**Game**

# Final Jeopardy

*Make your wager*

**Final Question:**

**Final Answer**



Thank you for playing!

# Ethics Jeopardy

